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Contemporary Economics and Business Association
at George Mason University
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THE ADEQUACY OF PRIVATE REMEDIES IN AIR POLLUTION CONTROL

By Gordon L. Brady

This paper focuses narrowly on the adequacy of private remedies for air pollution under United States common law as compared with the statutory prescribed remedies of the U.S. Clean Air Act. If, as it is argued in this paper, common law remedies are adequate, why does the United States require a Clean Air Act? A case study of the enforcement of sulfur discharge regulations relevant to electric utilities in Ohio shows that the efficacy of the U.S. Clean Air Act over private remedies is indeed questionable. Several possible justifications for the U.S. Clean Air Act are considered.

Environmental quality management does not stop at national frontiers or ideological barriers. Pollution in the atmosphere and oceans affects all nations. Many of our resources — the atmosphere and the oceans, for example — are "global commons" owned by no individual, corporation, or government. Because of continued population growth and economic development worldwide, environmental quality management issues are more pressing today than ever before.

Modern nations have often encountered environmental quality management as a controversial and divisive issue with dramatic social, political, and economic dimensions. Resource degradation, economic development, population growth in less developed countries, the disparity between rich and poor, and transboundary pollution *all* relate to the environment and may have far reaching domestic and international implications. Consequently, it is important both for developing countries and industrialized countries to consider the benefits of economic growth as well as the possible adverse effects on the environment.

This paper concentrates on the implementation of air quality management regulations in the United States. Yet, the results may be generalized and can be useful to other countries with much different institutional structures and at different stages of

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industrial development. While legal systems differ in most nations of the world, the basic environmental quality management tools are similar. Environmental quality management programs are composed either individually or a combination of judicially implemented private common law remedies, a regulatory bureaucracy, or market-based incentive approaches.(1) The problems that have arisen in the U.S. system are outlined as the basis for improving our understanding of the limitations of environmental quality management approaches.

1. Common Law Remedies

U.S. environmental law is an amalgam of common law and statutory principles. Its common law roots lie in the doctrinal development of nuisance, trespass, and strict liability for particularly hazardous activities. Tort liability may vary between Anglo-American jurisdictions, but unlike trespass, nuisance offers liability regardless of fault. Nuisance actions have challenged every major industrial and municipal activity which is subject to environmental regulation. As an environmental remedy, there is no common law doctrine that approaches nuisance in comprehensive or detail.

The substantive legal principles governing the correction of environmental externalities in this respect have not changed for centuries. Private nuisance law has, since the 13th century, provided remedies for unreasonable intrusions upon the use or enjoyment of another's property.(2) As a matter of legal reporting, there have been laws and cases dealing with air pollution since the 14th century when an English king issued a proclamation prohibiting unnecessary smoke in London. A 16th century nuisance case involved a city official who permitted swine to run loose to "corrupt and infect" the air. Upon a complaint, a writ was issued directing the official to clean the street and prevent such future detriment. Mandamus emerged in English common law as a remedy designed to make government officials take positive action where they were under a duty to act. Mandamus developed as a high prerogative writ of a "most extensive remedial nature...and issues in all cases where the party hath a right to have anything done, and hath no other specific means of compelling its performance."(3)

Public nuisance law continues to afford protection from "unreasonable" interference with the users of common property

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resources. The Clean Air Act and the several environmental statutes of the early 1970s represent an attempt to legalize specified levels of permissible nuisance and to provide an action-forcing mechanism to limit the discretion of federal, state, or local government officials in the implementation and enforcement of environmental law.(4) The Clean Air Act basically attempts to prescribe deterrence through monetary sanctions which go to public coffers rather than to the involuntary consumers of the externality. While remedies available to the individual are not limited or proscribed by the Act, the intention of the framers was clearly to move away from reliance on private remedies as a means of controlling environmental externalities.(5)

1.1. Nuisance

Nuisance as a remedy for environmental harm presents a somewhat confused picture. Conduct may constitute a public nuisance and a private nuisance simultaneously in that a civil action may lie while the defendant's behavior is also punishable as a species of offense.(6) Unfortunately, both are often discussed without distinction.

A public nuisance is defined by Harper and James as, "...a species of offense against the public at large which is punishable as a crime at common law or by statute."(7) Traditionally, in order to maintain an individual remedy for a public nuisance, the plaintiff must show that the damage suffered is distinct from, and greater than, that sustained in common with other persons affected by the same nuisance. Public nuisance is not actionable by an individual unless it also constitutes a private nuisance, that is to say, the individual suffers from some harm particular to himself. Certain public rights are likely to be violated by an activity which substantially interferes with the private interests of a large number of individuals. But, on the other hand, any interference with the rights of a small group of people would not inevitably be actionable as a private nuisance. The individual must have sustained the harmful effects of the nuisance such that the particular loss or damage has been localized to that individual.

Specifically, pollution by chemical and residual discharges in a navigable stream that interferes with the fishing and bathing rights of all who would use the stream is a public nuisance but

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not a tort against any one individual sustaining the common damage.(8) The results are mixed in this area of law. While the "special injury" test has also been used to deny relief for certain types of private nuisance, an owner of a commercial fishery sustaining damages to his business has been entitled to recover. In *Page v. Niagara Chemical Div.*, the court denied relief to a worker affected by dust fumes and smoke from a nearby factory.(9) *Gibbons v. Hoffman* and *International Shoe Co. v. Heatwole* denied relief for a frequent user of public water polluted by the defendant.(10)

Columbia River Fisherman's Protective Union v. St. Helens was an important modern development in nuisance law.(11) It held that any person injured in fact should be able to sue for equitable relief or monetary damages. When such a suit is brought for monetary damages, the public nuisance becomes a private nuisance. Moreover, nonenvironmental cases have suggested a willingness on the part of the U.S. Supreme Court to reject the traditional requirement for damage that the plaintiff suffer a requisite degree of harm or experience a distinctive injury.(12) In other words, under this interpretation harm does not have to be greater to the individual plaintiff than to anyone else and only some injury is required to maintain a civil action in nuisance.

Private nuisance is any substantial and unreasonable interference with the use or enjoyment of an interest in land causing harm. That is to say, "Any interest sufficient to be dignified as a property right will support the action."(13) The courts have tended to be result selective by focusing on the damages or injurious results of activity deemed as unreasonable. They have focused on whether the actor's interference accorded with orthodox elements of tortious liability, such as the absence or presence of:

- Intent to injure the property of another; or
- Reckless conduct of the person in occupation of the property from which the nuisance proceeds.

The relationship involved in nuisance controversies is usually of property origins. The likely type of plaintiff is the tenant or homeowner of the property affected by the nuisance. Case law supports according the defendant the power of eminent domain but requires compensation for permanent damages to the plaintiff; even when the defendant's enterprise, for example, is suitably located and its pollutant discharges controlled with the

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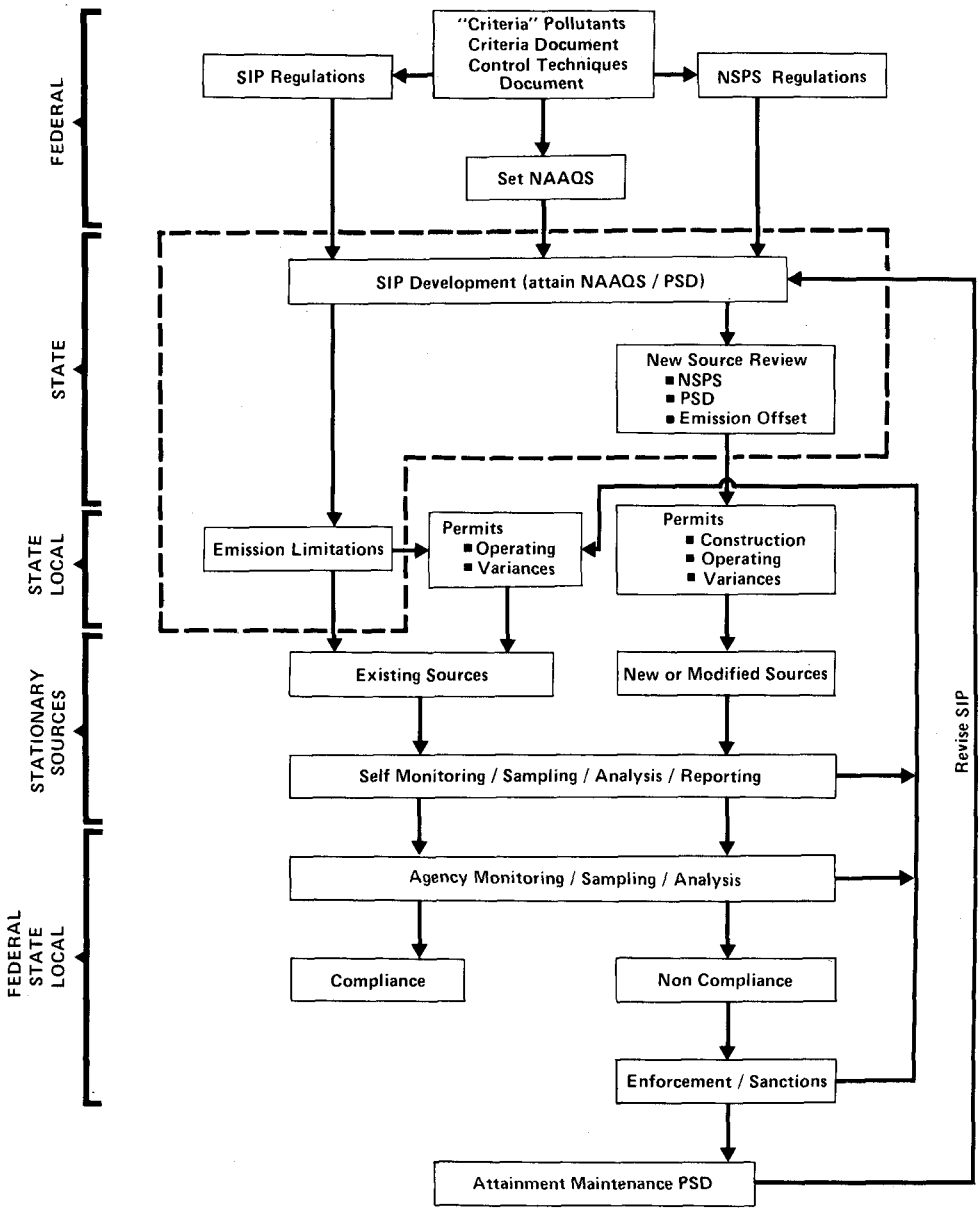
MAJOR ELEMENTS IN AIR QUALITY MANAGEMENT IN THE U.S.



SOURCE: Brady and Bower, Benefit-Cost Analysis in Air Quality Management, 15 Environmental Science and Technology 256 (1981)

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EXHIBIT 2

NATIONAL AMBIENT AIR QUALITY STANDARDS (NAAQS)

Pollutant	Averaging time	Primary standard levels	Secondary standard levels
Particulate matter	Annual (geometric mean)	75ug/m^3	60 ug/m^3
	24 hrs [b]	260 ug/m^3	150 ug/m^3
Sulfur oxides	Annual (arithmetic mean)	80 ug/m^3 (0.03 ppm)	--
	24 hrs[b]	365 ug/m^3 (0.14 ppm)	--
	3 hrs[b]	--	1300 ug/m^3 (0.5 ppm)
Carbon monoxides	8 hrs[b]	10 mg/m^3 (9 ppm)	10 mg/m^3 (9 ppm)
	1 hr[b]	40 mg/m^3* (35 ppm)	40 mg/m^3* (35 ppm)
Nitrogen dioxide	Annual (arithmetic mean)	100 ug/m^3 (0.05 ppm)	100 ug/m^3 (0.05 ppm)
Ozone	1 hr[b]	240 ug/m^3 (0.12 ppm)	240 ug/m^3 (0.12 ppm)
Hydrocarbons (nonmethane)[a]	3 hrs (6 to 9 a.m.)	160 ug/m^3 (0.24 ppm)	160 ug/m^3 (0.24 ppm)
Lead	3 mos	1.5 ug/m^3	1.5 ug/m^3

*EPA has proposed a reduction of the standard to 25 ppm (29 mg/m^3).
[a]A nonhealth-related standard used as a guide for ozone control.
[b]Not to be exceeded more than once a year.

SOURCE: Reprinted from CEQ (1980), p. 172.
Information provided by the U.S.
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best available technology.

Many wrongs which have been loosely called nuisance depend entirely on the conduct of the actor. For example, Mr. Justice Cardozo cites situations in which a lawful activity was turned into a nuisance situation through inadequate maintenance activities.(14) The "coal hole" left uncovered or the tumble-down house may become a menace.(15) However, there are many instances where the nuisance does not depend upon negligence, gross or otherwise. In such instances it is immaterial that the defendant has employed all reasonable precautions to avoid harm. The plaintiff cannot rely on the existence of a duty imposed by law requiring that due care be exercised. Nuisances differ from cases falling within the abnormally dangerous activity rule in *Rylands* in that damage is usually a continuing occurrence rather than an isolated and sudden invasion of the plaintiff's interest, though occasionally, this harm may also be encompassed.(16)

1.2. Standing to Sue Doctrine

a. The Jurisdictional Issue

Standing to bring suit can be obtained if there is past, present, or potential harm as alleged in the controversy. Standing raises the threshold question of whether the litigant is the proper party to bring a particular suit.

Standing has been a major institutional barrier to plaintiffs in public nuisance cases. Restatement Second, Section 831C(1), requires that "[i]n order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public which was the subject of interference."(17) However, the interest at stake for the victim of public nuisance is qualified by requiring that "[i]n order to enjoin or abate the public nuisance, one must have standing to sue as a representative of the general public, as a member of a class in a class action, or as a citizen in a citizen's action.(18)

The federal law of standing is derived from the language of Article III of the U.S. Constitution, which limits federal jurisdiction to "cases and controversies."(19) Standing has been treated as a part of the question of justiciability, or whether the action is proper for examination in the courts. The concept of

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"justiciability" has been interpreted to include the elements of mootness, political questions and ripeness, as well as standing.(20) In implementation, the doctrine of standing has become a blend of indistinguishable constitutional requirements and policy considerations.(21) Collectively, these concepts have frequently been used by the courts to thwart public participation in the judicial process.

The traditional principles, called the "legal interest" or "legal rights" theory, upon which standing developed prior to 1970 may be summarized in the following points: (22)

(1) Personal stake in the dispute's outcome as to assure the court of truly adversary presentation capable of judicial resolution;

(2) Suffering invasion of some legally protected right of interest;

(3) Injury to a protected interest must be distinguishable from that of the general public.

The impact of this so-called "legal rights" theory for individuals was to preclude judicial review of certain governmental actions affecting the general public irrespective of the actual injury to the individual that might arise from such governmental activity in behalf of the public. Damages suffered by the plaintiff in such cases were considered *damnum absque injuria,* which means "loss, hurt, or harm without injury" in the legal sense, that is, without such breach of duty as it redressible by an action; a loss which does not give rise to an action for damages against the person causing it."(23)

In 1970, a major turning point in the U.S. development of standing as it might be applied to environmental law occurred in *Association of Data Processing, Inc. v. Camp.*(24) The legal interest theory was specifically rejected as addressing itself to the merits rather than to the jurisdictional question of standing. The legal interest test required an examination of the relationship of a statute to the particular issue for which standing is sought. The doctrine advanced in *Data Processing,* on the other hand, demands only a determination of "whether the interest sought to be protected by the complaint is arguably within the "zone of interests" to be protected or regulated by the statute or constitutional guarantee in question."(25) Although the zone of interest theory appeared to relax the requisite invasion of a legally protected interest, it still required that to assert the "public interest," it is necessary that a statute confer a right to

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do so. Several judicial interpretations are worthwhile to review in the development of U.S. environmental law.

In *Data Processing,* the court set forth a two-pronged test for the determination of standing under the "person aggrieved" language of Section 10 of the U.S. Administrative Procedure Act.(26) Where there is no statutory preclusion to judicial review, the court held that 1) the plaintiff must allege "that the challenged action has cause him injury in fact, economic or otherwise, or 2) it must be shown that the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question...That interest, at all times, may reflect aesthetic, conservational, recreational, as well as economic values."(27)

More than a year before *Data Processing* the Court of Appeals for the District of Columbia reversed the denial of standing in *Citizens Association of Georgetown v. Simonson.*(28) Reasoning from *Flast,* a non-environmental decision, the Supreme Court maintained that "standing" depends primarily upon the existence of a logical and adequately direct nexus between the plaintiff's interests and the adverse action of the opposing party or parties.(29) In this line of reasoning, the court in *Environmental Defense Fund v. Hardin* held that a coalition consisting of the Sierra Club and the National Audubon Society, were unwilling consumers whose indirect consumption of poisons containing the pesticide DDT met the injury requirement.(30) The court argued that consumers of regulated products and services "have standing to protect the public interest in the proper administration of a regulated system for their benefit."(31)

In *California Environmental Study Group v. AEC,* a suit to block a nuclear power plant, the court held that standing is dependent on the particular factual events.(32) The plaintiffs were held to have a life and personal stake in provisions for financial responsibility for undesired effects if all safeguards failed.(33) Standing was granted on the basis that the plaintiffs had a present interest in the construction of the plant; they would suffer a small amount of damage when the operation of the plant begins, and they would have an objectively reasonable apprehension that future and perhaps major damage may be caused by uncontrollable leaks or ruptures of the containment devices.

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In sum, standing is a requirement that relates to the jurisdictional issue in the concrete cause; it does not concern either the elements of nuisance as a tort or the ultimate merits of the particular controversy. Standing has, in the eyes of the courts, been very much a contextual question. In conclusion, it may be emphasized that Chief Justice Warren in *Flast v. Cohen* stated that one has sufficient adverse interest necessary for a justifiable case if "there is a logical nexus between the status asserted and the claim sought to be adjudicated."(34) Justice Brennan's concurring opinion went so far as to argue that *Flast* has already reduced standing requirements to constitutional adverseness, a requirement which most environmental organizations could meet as Private Attorneys General.(35)

1.3. Private Attorneys General

It was not until 1965 that standing was accorded for the protection of noneconomic interests of Private Attorneys General. In *Scenic Hudson Preservation Conference v. FPC,* an association of nonprofit conservation organization successfully argued that they possessed a "recreational interest" in the maintenance of the area in its natural state.(36) They were granted standing as Private Attorneys General and as an "aggrieved party" under the review provisions of the Federal Power Act.(37) In resolving standing, the court stated:

> In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of "aggrieved" parties under Section 313(b). We hold that the Federal Power Act gives petitioners a legal right to protect their *special interests.*(38) (emphasis added)

Decisions following *Scenic Hudson* have sanctioned the doctrine that economic injury is not a requisite of standing for Private Attorneys General. In *Citizens Commission for Hudson Valley v. Volpe* standing was granted the Sierra Club and other environmental co-plaintiffs to assert the public interest in preservation of natural resources, scenic beauty, and historical landmarks.(39) In *Review League v. Boyd,* standing was granted for a plaintiff asserting such environmental interests with no

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legally protected economic interests.(40) In *Environmental Defense Fund, Inc. v. Hardin,* standing was granted to a Private Attorneys General alleging no personal injury to members of its organization, but an injury to the public in general.(41)

In *U.S. v. SCRAP,* the Supreme Court held that in order to act as a Private Attorneys General the petitioner must "...demonstrate a genuine and legitimate interest in the outcome of the issue at bar."(42) In *SCRAP,* three law students of George Washington University National Law Center were granted permission to seek review of an Interstate Commerce Commission (ICC) decision involving the impact on the environment of an increase in freight rates.(43) On appeal, the U.S. Supreme Court rendered a mixed decision: 1) held (5-3) that an environmental plaintiff which alleges that illegal federal agency action would *directly* harm its aesthetic and recreational interests has standing to sue as a party "adversely affected or aggrieved by action" under Section 10 of the APA; and 2) held (6-2) that the District Court lacked jurisdiction to enjoin the exercise of the ICC's suspension power despite alleged noncomplicance with NEPA's procedural requirements.(44) The court acknowledged that the "injuries alleged were tenuous, uncertain, and virtually impossible to prove." The court noted, as in *Sierra Club v. Morton,* that it was unnecessary to apply the zone of interest test of *Data Processing* since it was "undisputed" that *SCRAP's* environmental interest for which protection was sought was within the interests protected by NEPA.(45)

In summary, for environmental cases, *SCRAP* suggests that standing may be conferred for challenges to administrative actions where an economic injury is absent, where alleged injury is not unique to the petitioner, and even where the alleged injury has only faint and uncertain impact upon the petitioner.

1.4 Requirements to Maintain an Action Grouped in Private Nuisance for Environmental Harm

The general rule of law of the Second Restatement on Torts is that a person is subject to liability for private nuisance if his or her conduct is "a legal cause of invasion of another's interest in the private use and enjoyment of land."(46) "Anything which annoys or disturbs one in the free use, possession, or enjoyment of his property, or which renders its ordinary use or occupation physically uncomfortable is a 'nuisance' and may be

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restrained."(47) The Restatement qualifies nuisance not only by the type of conduct but also by the type of invasion. Furthermore, both the operative facts pertaining to the conduct and the resulting harm are evaluated, both individually, and against each other.

1.4.1 Invasion

An invasion is an interference with or an obstruction to another's interest in the use and enjoyment of land or it may be an interference with a public right. With respect to the latter, in *Ozark Poultry v. Garman,* a plant was required to abate as a private nuisance on showing that odors emitted from the plant often prevent homeowners and other persons in the vicinity from sleeping at night or eating meals without nausea."(48) The invasion may take place through more than one type of conduct, but the most crucial element determining liability is the "reasonableness" of the action. It may be unintentional, but caused by negligent or reckless conduct; or it may result from an abnormally dangerous activity for which there is strict liability.(49)

1.4.2 Conduct

A typical situation encountered in pollution cases involves a defendant who fully understands what he is doing, but the operation of some type of activity results in discharges which are offensive or harmful to others.(50) Courts have focused on the reasonableness of the invasion rather than looking at the malice, ill-will, reckless, or negligence of the conduct.

"Unreasonable" has been interpreted to entail the element of continuing or recurring invasion. The first invasion may be either intentional or unintentional; but when the conduct is continued after the actor knows that the invasion is resulting from it, further invasions are intentional.(51) However, the existence of intentional invasion has not been interpreted by the courts to mean that it is unreasonable; some intentional invasions have been held by statute to be unreasonable. An example of a generic statute expanding the reach of nuisance law would be a zoning ordinance declaring nonconforming uses to be nuisance *per se.*(52) Other types of invasions may impose harms so that "an actor is subject to liability if the harm resulting from the invasion is substantial and greater than the other

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shall be required to bear without compensation."(53)

An actor is not liable for accidential interferences with the use and enjoyment of land, but only for such interferences that are "intentional and unreasonable or result from negligent, reckless, or abnormally dangerous conduct."(54) An intentional invasion is characterized by the purpose of the actor – he acts for the purpose of causing something to occur or knows that an invasion is likely to result from his conduct.(55) For example, an intentional invasion of another's interest in the use and enjoyment of land is unreasonable – if – the harm caused by the conduct is substantial and the burden of compensating for this and other harms does not render infeasible the continuation of the conduct."(56) To be actionable, the invasion must be unreasonable with liability for damages imposed in those cases in which the "harm or risk to one is greater than the one ought to be required to bear under the circumstances.(57)

Invasions, however, are relative to the contextual circumstances. Therefore, many interferences can be justified as reasonable although the actor knows they are resulting *or* are substantially certain to result in various types of harms. However, in *Mullins v. Beatrice Pochahontas Company,* the court held that a coal processor can emit only that amount of coal dust *reasonably* necessary to produce marketable coal – and – cannot impose on nearby property owners the burden of its pollution if means of collecting the coal dust are reasonably available.(58) In determining reasonableness of control efforts, the trier of fact considers not only the special interests of the actor, but also the common interests of the community as well. An illustrative case is *Bartel v. Ridgefield Lumber Co.* where the defendant's lumber company was located in the manufacturing district of a saw mill town in timber country.(59) Smoke, sawdust, and half-burned embers damaged the plaintiff's nearby farm. The court held damages to "...lie, without regard to the legality where such business is carried on and notwithstanding the business be entirely lawful."(60)

1.4.3 Balancing the Gravity of Harm Against the Utility of the Activity

In case law, one or sometimes several factors concerning the gravity of harm versus the economic utility of the activity emerge as decisive. In the language of the Restatement, factors

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illuminating the gravity of harm to be balanced by the court include:

- The extent and character of the injury;
- The social value of the use invaded;
- The suitability of the activity to the locality;
- Burden of avoiding the harm imposed on the recipient of the harm.

The utility of the conduct is influenced by its social value, its suitability to the locality, and the impracticality to the plaintiff of avoiding the invasion.(61) A resultant selective approach by the courts has led to an evaluation of the utility of the offending conduct and the alternatives to the plaintiff for avoiding the harm created by the defendant's activity.(62) Cases involving strong or unpleasant odors seem to dominate as adverse effects whereas smelters and steel coking operations receive a more favorable evaluation by the courts.(63)

Pollution cases have offered a strong test of nuisance law because the stated objective of firms is to produce something of economic value; pollution is a by-product from certain types of production processes, although not necessarily unrecognized by the discharger. Although the Restatement affirms that harm to others must be "intentional and unreasonable" as a condition of liability, this condition may be met in Professor Fleming James' words, "even where the condition or conduct causing (the invasion) is socially useful, is maintained and conducted with all due care and in a suitable and convenient location, if the harm caused is reasonably great."(64)

1.5 Remedies for Private Nuisance

Remedies for private nuisance may include court orders requiring abatement or reduction in discharges though production alteration or product modification, compensation, or injunction. Requiring the defendant to shut down and move elsewhere has been an extreme remedy. The installation of "modern" or "best technology available" equipment and innovation in control measures has often been encouraged if it could be demonstrated to be "economically feasible." The remedy in *American Smelting and Refining Company v. Godfrey* as in other cases has not been to enjoin operations, but instead to decree the installation of physical measures to limit discharges or to impose limitations upon the content of inputs

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(e.g., sulfur content in coal or oil) as a means of forcing abatement of discharges.(65)

The courts have often shied away from imposing residuals modification and abatement requirements on dischargers. Courts argue that the decision rule is to weigh or "balance" the various competing interests, of both producer of the harm and the involuntary recipient. For example, in balancing the social utility of the defendant's behavior, the court held in *Bove v. Donner-Hanna Coke Corporation* that the coke ovens were but a "petty annoyance"; the activity was seen as "indispensible to progress."(66) In *Buffalo v. Savage,* the court held the plant immune from injunction on the rationale that "modern" control equipment had been installed (at some cost) and consequently emissions from their operations were unavoidable – at least at a cost which the court apparently considered "reasonable" to the firm.(67)

Reasonableness often enters the court's calculus on the side of the cost of abatement for the discharger. Judicial decisions seek to pit control cost against the types of harm or adverse effects created by the invasion. Yet, the courts are not capable as institutions of assessing the magnitude of either harms or costs. Harms are subject to underestimation due to the uncertainties of various terms of exposures to residuals and the reversibility of effects just to mention a few. Only in the last few years have there been concerted efforts to quantify the economic value of adverse effects which are avoided by reducing discharges of various residuals.(68) While the direct costs of control are more easily estimated using financial accounting data, one must also consider the regional economic impact and the effect on the incentive of the firm to innovate in estimating the cost of control. It is also necessary to consider the monitoring and enforcement costs of the agencies charged with the enforcement of the law.

The following cases provide a feel for the "weighing" of incommensurables, unquantifiables, and illusive harms. In *Waschak v. Moffat* and *Pennsylvania Coal v. Sanderson,* the courts held that no nuisance existed when damages were weighed against the value of the defendant's business to the community, that is the value of the adverse effects of residuals discharged into the environment were seen to be less than the social utility of the businesses involved.(69) In *Madison v. Ducktown*

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Sulfur, Copper, and Iron Co., the court held that discharge reduction was not required because the larger interest of the defendant was the paramount consideration.(70) The defendant argued successfully that the protection of the several tracts of land involved (each worth about $1,000) would require that they spend $2 million on pollution abatement controls.(71) But, in *Hubert v. California Portland Cement* and *Woodruff v. N. Bloomfield Gravel Mining Co.,* controls were required by the courts because the smaller interest in terms of absolute expenditure of the residents does not have to yield to a larger interest of the discharger.(72) Despite the hardship pleas of the defendant, the courts in these two cases enjoined the dischargers.

The plaintiff is ordinarily restricted to monetary damages, but if he can show that the legal remedy is inadequate, the court will often enjoin the defendant from continuation of his conduct.(73) In *Renken v. Harvey Aluminum,* an injunction was used to require state-of-the-art control technology.(74) In *People v. Selby Smelting and Lead Co.,* the court simply required the installation of "emission controls."(75) In *Kosich v. Poultryman's Service Corporation,* the court required adjustment of odor control processes.(76) Pursuing the same line of reasoning, *Smith v. Ann Arbor* required the city to reduce the batch size of garbage burning – a somewhat simple technological prescription.(77) Other cases have required more elaborate production modification, e.g., in *McCarthy v. National Carbonic Gas,* the defendant was required to install equipment and to use different production inputs.(78) At times the courts have been quite specific about the amount of abatement which they think is adequate to mitigate damages to recipients. In *Georgia v. Tennessee Copper Co.,* the court held the injury was avoidable and ordered the smelter to limit SO_2 discharges to 20 tons per pay.(79) No technical arguments were presented in the case – the determination of the absolute amount of permissible discharge is unclear. Apparently some reasonableness criteria was used.

In other cases, the courts have provided compensation for recipients of certain types of invasions. In *Boomer v. Atlantic Cement Co.,* the defendant was held to have the power of eminent domain, but required to compensate the plaintiff for damages incurred.(80) This decision was reached even though the defendant was construed to be using the "best control technology" which at that time was argued to be available. *Boomer*

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was later overruled by *Whalen v. Union Bag* which gave the defendant one year to control emissions of air pollutants.(81) However, in *Folmar v. Elliot Coal,* the court held that landowners located within 1,500 feet of a coal processing facility, which (in the eyes of the court) had done everything then known and considered economically feasible to eliminate air pollution, are not entitled to damages for the adverse effects of coal dust.(82)

1.6 Conclusion: The Rule of Law in Private Nuisance

Rather than to focus on standing and other obstacles to public nuisance actions, this section draws together the common law rights for private nuisance which have been and continue to be available in varying degrees. Private nuisance lies for various types of "non petty annoyances." Private nuisance may be used to accomplish "abatement" of discharges to some judicially determined level through input changes, e.g., low sulfur coal or oil; modification to the production process, e.g., equipment; changes in the hours of operation; changing the size of batches of trash burning operations. The common law allows compensation for destruction/reduction in property values through the power of eminent domain. In this way, common law nuisance sets up an amoral remedy which entails the problem of valuation, both idiosyncratic and otherwise. If handled properly, it should force the internalization of the costs imposed on involuntary recipients of the externality.

Common law nuisance actions have shortcomings, and the obstacles are often formidable. It must be shown that the discharger's actions are unreasonable with respect to the cost of control or the cost imposed on the recipient to avoid the damages of the discharger's actions. In cases where the court is convinced that the discharger is doing what it technologically and economically feasible, no action is taken on behalf of the recipient. Since multiple sources of discharges often contribute to the air pollution levels in a given location, it may be impossible for a plaintiff to show which among several air pollution sources in an area is the proximate cause of the harm. While it is possible to enjoin all sources in an airshed, courts will require that the injury is traceable to each defendant. Consequently, depending upon the type of injury that is being claimed, the

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plaintiff will not always be able to show the requisite substantive invasion. The cost to an individual plaintiff may exceed the damages of the invasion.

Finally, the plaintiff's action is subject to the balancing of the social (or economic) utility of the defendant's activity and the gravity of the harm imposed on recipients. Consequently, since the major sources of air pollution are often large and important economic entities to a specific region, the injury must be extreme before a private nuisance action is worthwhile for the individual plaintiff. Nor may it be cost-effective as a social mechanism to internalize the damages of residuals discharge. Section 1 provided a discussion of the common law private nuisance remedy; it held that the private nuisance remedy has teeth, although entailing significant difficulties for the individual litigant. Section 2 focuses on the Clean Air Act as an attempt to institutionalize specific elements of private remedy actions.

2. The Clean Air Act: A Regulatory Framework

The Clean Air Act Amendments of 1970 contain four major provisions for managing air quality as it is affected by stationary sources. (See Exhibit 1 for a general description)

1. The Environmental Protection Agency (EPA established national ambient air quality standards (NAAQS) for the so-called "criteria pollutants," primary standards to protect human health and secondary standards to protect welfare;(83) (See Exhibit 2)
2. EPA was required to establish emission standards for sources of pollution that were constructed after the issuance of regulations;(84) (called new source performance standards)
3. States were required to prepare implementation plans showing how they would achieve and maintain the National Ambient Air Quality Standards (NAAQS); (85) and
4. EPA was required to establish national emission standards for hazardous air pollutants.(86)

The principal elements of the air quality management in the Clean Air Act include direct regulation through conditions placed on the operation of activities that discharge pollutants. Permits to operate often include: 1) the specification of

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discharge limits from stationary sources; 2) the specification of production processes (technology); 3) the specification of the quality of input materials to production. The second element includes a monitoring and enforcement program to ensure that the sources are complying with the conditions specified in the permit; various types of economic incentives, such as tax credits, low interest rate loans, and rapid depreciation for investment in "air pollution control" facilities. Conceptually, the regulatory structure of the Clean Air Act is driven by the objective of achieving the NAAQS.

Because state governments are often responsible for the administration of EPA regulations, EPA in actuality may have little direct control over the ways in which decisions are put into practice. Section 110 requires that each state produce and submit to EPA a State Implementation Plan (SIP) which shows how the primary ambient air quality standards will be met within state boundaries.(87) The SIP must show how compliance with the primary standard is to be achieved within a specified time period. However, if a state shows that the application of "reasonably available alternative" means of attaining the primary standards will not achieve the standards within the required time period, the EPA Administrator may extend the data of compliance.(88)

If EPA disapproves the SIP submitted by the state, the Administrator must promptly prepare and promulgate a SIP for the state. In addition, Section 113 allows EPA to assume enforcement of the SIP provisions against any or all sources if the Administrator determines that the state has failed effectively to enforce the approved SIP.(89)

Section 304 permits "any person" to bring civil action on his own behalf against "anyone":

> (1) who is allegedly in violation of emission standards of limitations (including the federal government); or
>
> (2) the Administrator of EPA for failure to perform a nondiscretionary act or duty.(90)

Remedies are limited to a temporary restraining order or a preliminary injunction against violators of an emission standard, limitation, or administrative order. A mandamus may be sought to compel EPA to perform nondiscretionary duties such as adherence to the statutory time frame for promulgating regulations or correcting SIPs. Fines may be issued against violators, but plaintiffs cannot receive damages. Litigants may receive

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reimbursement for legal fees in bringing such cases.

3. How the Clean Air Act Handles SO_2 Emitters

Decisions about environmental quality goals and the choice of implementation strategies entail hard choices between oftentimes conflicting objectives. Achieving one objective may come at the expense of or provide gains to particular industrial categories or regional interests. Often, there are distributional impacts – with respect to both the costs of and the benefits from air quality management – on regions and socioeconomic groups in relation to income, employment, and race. Ohio provides an example of how such factors congeal and focus within the regulatory framework of the Clean Air Act.

Ohio burns more coal than any other state, with 70 percent used to generate electricity. The state also has extensive coal-mining interests. Ohio's coal has a high-sulfur content which makes the sulfur dioxide standards for coal-fired power plants and their attendant regulations of critical importance to the state.

In January 1972, the Governor of Ohio submitted its SIP for review by the Administrator of EPA.(91) In May 1972, the Administrator approved the Ohio plan with specific exceptions.(92) Full approval of the SIP occurred in April of 1974.(93)

In June 1973, *Buckeye Power Company, et al. v. EPA,* the court vacated the Administrator's approval of the Ohio plant and remanded the case to the agency for compliance with the Administrative Procedure Act.(94) The court held that the agency had not fully opened the decisionmaking process, nor had it developed an adequate factual record upon which to base its decision.

In August 1973, the Ohio Governor withdrew Ohio's SIP provisions concerning the control strategy and regulations for control of sulfur dioxide. The plan was submitted in November 1973 and approved in April 1974, noting specific differences including the SO_2 control provisions.

In May 1974, the Governor submitted SO_2 control provisions to the Administrator. However, in September, the Ohio Environmental Board of Review overturned a portion of these provisions, rendering them unenforceable by the state. Since the SO_2 provisons were no longer subject to state enforcement, the

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Administrator held it to be an ineffective submission and no further rulemaking action was taken. Where it is determined that a SIP does not meet the requirements of the Clean Air Act, the Administrator must promulgate a substitute SIP.(95) In November 1975, the Administrator proposed alternate SO_2 provisions.

Let us look at the EPA attempts to achieve the proper input of public comment with respect to the plans. A memorandum was issued by EPA in December 1975, identifying specific issues likely to raise those issues, and appropriate responses for the hearings.

Hearings were held by EPA in Cleveland, Steubenville, and Columbus. From these public hearings the economic consequences of the proposed SO_2 provisions emerged as the dominant issue. Complaints raised in the public hearings and a final sulfur dioxide SIP were published by EPA in August 1976.(96) Final technical corrections in the SO_2 provisions were made on November 30, 1976. Thirty-six petitions for review were filed with the U.S. Court of Appeals for the Sixth Circuit.(97) In *Buckeye Power Inc.,* the court entered a stay of enforcement and ordered EPA to reopen the administrative record, allowing petitioners to further comment on the regulation, and amend the regulations as necessary.(98) Amendments to the SIP had given the coal-fired power plants 3 years to comply. The court upheld EPA's sulfur dioxide provisions for Ohio and ruled there was no reason for further delay. However, in *Union Electric* the court gave the utilities 17 weeks to specify the means of compliance with CO_2 emission reduction requirements; the burning of low-sulfur coal; the use of mechanical coal washing or coal blending; the installation of scrubbers.

Once the record was reopened and the amendments published, the court conducted hearings on the petitioners' complaints regarding the EPA plan. The court addressed three issues: 1) an Ohio motion that the court reject EPA's plan as "arbitrary and capricious," and that it allow the state another opportunity to prepare a plant; 2) a petition to remand the case to EPA for adjudicatory hearings; and 3) EPA's selection of an air quality model to determine SO_2 emission standards.(99)

The court rejected the Ohio motion "on the basis of a record of delay and default which has left Ohio in the position of being the only major industrialized state lacking an enforceable plan for the control of sulfur dioxide."(100) The court held Ohio

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had failed to submit a plan and "five years have now elapsed beyond the date when such an implementation plan was called for under the Clean Air Act...under these circumstances, we find no warrant, consistent with the purpose of the federal legislation, for giving heed to Ohio's petition for further delay."(101)

Next considered was a motion to remand the case to EPA for resolution through agency adjudicatory hearings. Several utilities petitioners argued that due to the number of technical issues and specific findings, the normal comment period was not sufficient and to assure due process, adjudicatory hearings were required. However, the Sixth Circuit ruled that the legislative-type hearings conducted by EPA "...were consistent with the provision of the Clean Air Act and the Administrative Procedure Act."(102)

The final major issue in *Union Electric* concerned EPA's choice of air quality dispersion models for determining applicable discharge standards for SO_2 dischargers. The court held the selection of specific air quality simulation models was not arbitrary and capricious, its data base was sufficient, and therefore EPA's standards were neither arbitrary nor capricious.(103)

Because eight utilities – operating some 24 plants – wanted to burn low-sulfur coal, the case took on a new set of complexities due to economic considerations.(104) The U.S. Clean Air Act authorizes the President or his designee, after notice and public hearing, to determine whether action under subsection 125(b) is necessary to mitigate significant local or regional economic disruption or unemployment.(105) Specifically, such adverse economic impacts were argued to result from allowing utilities to burn coal other than that locally or regionally available. Consequently, a SIP may include requirements that utility enter into long-term contracts for supplies of regionally available high-sulfur coal. A utility may also be required to install other means of abatement including scrubbers. EPA was petitioned by the United Mine Workers of America (District 6), the Ohio Mining and Reclamation Association (a coal operators' trade group), Senator Howard M. Metzenbaum (D-Ohio), and Governor James A. Rhodes to open proceedings under Section 125.(106) In mid-July 1978, EPA published notice to open the proceedings.

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In a letter to EPA Administrator Costle, the UMW asked the agency to investigate the possible effects of several utilities' planned switchover to out-of-state coal.(107) The February letter argued that unemployment and regional economic disruption would occur in southeastern Ohio if utilities were allowed to burn out-of-state low-sulfur coal. In April 1978, Governor Rhodes, who was also seeking reelection in the fall of 1978, sent President Carter a telegram asking for a three-year moratorium on sulfur dioxide standards for the state. In early May, he wrote EPA Administration Costle arguing that the Clean Air Act would close many southeastern Ohio coal mines and would affect that area "more than any depression." The Governor argued that scrubbers "have a reliability factor of about 50 percent" and that installing them would mean a 10 to 20 percent increase in consumers' electricity bills. Finally, "I am asking and praying for a compassionate compromise to prevent financial disaster, higher utility bills and higher unemployment." EPA officials responded by accusing the Governor of "using EPA as a political football" and calling him "unwilling" to meet with them.(108)

On July 6, EPA denied the request. On the same date, Governor Rhodes challenged EPA to send its technicians to the one utility in Ohio that had scrubbers installed – and was experiencing severe difficulties – to "fortify its argument by making the (plant's) scrubber work." Scrubbers were argued to reflect an "unproven technology" imposed upon the state by a "blinded bureaucracy which does not have to pay the bill."(109)

EPA held public hearings in mid-August as required for Section 125 determinations. Those arguing for the Section 125 determination – Senator Metzenbaum, the UMW and the Ohio Mining and Reclamation Association – predicted an increase in unemployment and vast economic disruption in southeastern Ohio. And, if EPA decided that "significant local or regional economic disruption and unemployment" would result from the eight utilities' plants to burn out-of-state low-sulfur coal, then the utilities could be compelled to purchase pollution-control technology needed to meet the sulfur dioxide standards while burning Ohio's high sulfur coal.

The utilities used the hearings as a forum to request relaxation of the EPA-imposed standards. They argued that without Section 125 determination, they would have to install expensive and unreliable scrubbers. However, if the utilities were

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allowed to burn lower sulfur coal, these additional fuel costs could be passed on to consumers without authority from the state utility commission. But, on the other hand, they could not pass along the cost of the scrubbers to consumers without approval from the state utility commission.

The proposed Section 125 determination was based on the following specific charges: (110)

- The estimated loss in Ohio coal production during the period 1977-80 resulting from the shift to low-sulfur compliance coal by the Ohio utilities is 15 million tons.
- By the end of 1979, that projected curtailment would result in an estimated loss of 5,270 jobs in Ohio's southeastern coal producing counties, and about 5 per cent of Ohio's total coal miner workforce of 15,200 active miners in 1977. Secondary effects would result in losses of 7,910 to 10,030 jobs. Total employment loss attributable to the projected coal switch: 13,180 to 15,300 jobs, about 0.3 percent of Ohio's total state employment.
- Direct wage losses thereby attributable to the layoff of the miners was estimated to be $90 million annually; secondary losses $105 to $125 million annually. Total annual income loss: $195-285 million annually. Also, about $26 to $41 million to unemployment benefits would have to be paid representing a 10 percent increase in the state's unemployment outlays.

Based on this evidence, it seemed clear that the switch from "regional" or "local" coal by coal-fired power plants would cause significant economic disruption. (111) The debate then turned on the definition of just what is a "region." To Senator Metzenbaum, the region stops at the state line. At August 1978 hearings, he said, "we must prevent the utilities from switching to out-of-state coal." The Senator was the author of the Section 125 amendment in the Senate, and in his testimony "emphasize[d] that this law was intended to protect workers in a specific local area within Appalachia, such as those in southeastern Ohio." The amendment was passed to protect jobs, "wherever they are located." (112)

However, Kentucky's Senators Walter D. Huddleston and Wendell H. Ford found this interpretation difficult to swallow; West Virginia Congressmen feared it could lead to an "embargo" on their state's coal. It was argued that Section 125 should be interpreted as a provision against the eastern market

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being "flood[ed]" by western coal and insisted that their coal qualifies as the "locally or regionally available" coal contemplated in the amendment. Otherwise, they feared a "Balkanization of the coal industry.(113)

But the problems intensified, and in January 1980, the EPA Deputy Administrator Barbara Blum announced the creation of a six-member EPA team to "negotiate alternative compliance agreements with the utilities (in order to) save mining jobs through cooperation rather than issuing orders."(114) The team attended the public hearing scheduled for January 30 in Columbus on the proposed Section 125 determinaton.

The first results of this process were reported in late February. EPA announced that the Columbus and Southern Ohio Electric Company would burn Ohio coal after washing it; in this way, the federal standards could be met.(115) EPA and the utility said in a joint statement that, "this process would allow the burning of Ohio coal at less cost to the utility and the consumer than would be the cost of buying out-of-state coal. It would also help protect jobs of Ohio coal miners." However, EPA recognized that negotiations with this utility were most likely to bring early results and indicated that negotiations with the remaining seven utilities were expected to be considerably more difficult.

But at this point, politics clashed again with the addition of a new federal law. In early March, the Council on Wage and Price Stability (COWPS) urged EPA to "exercise caution" in a statement filed in response to the proposed Section 125 determination.(116) COWPS argued the "employment and economic consequences for southeastern Ohio are unlikely to be as severe" as EPA predicted; that it does not believe that Ohio by itself represents a distinct region; and that the remedial action that might be recommended under Section 125 "may have serious employment and economic consequences and possible disruptions in other parts of Ohio and elsewhere in the Appalachian region." The COWPS's order involved significantly higher costs for utilities and rate payers. It argued that inflation might be aggravated by the partitioning of coal markets, undue pollution of small sectors of the economy and "the replacement of performance standards with specific engineering standards for compliance with the [sulfur dioxide] emissions goal."(117)

On March 15, the Ohio Coal Commission asked President Carter to "convene a summit meeting" to resolve the sulfur

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dioxide problem in Ohio. On March 28, Governor James R. Thompson asked the President to hold hearings to determine whether his state's largest electric utility should be forced to use Illinois coal at one of its power plants, rather than low-sulfur coal as the company planned. Governor Thompson told the President that, "[I] must conclude that it is really the Federal Government that is causing significant economic disruption. The cause appears to be an inability on the part of the Federal Government to resolve conflicting energy, economic and environmental policies."(118)

On March 27, the Committee to Preserve the Appalachian Coal Market referred to EPA's study on the effects of requirements to burn low-sulfur out-of-state coal in Ohio "ludicrously inaccurate."(119) Instead of a 15 million ton loss in Ohio coal production, they predicted the actual loss would be closer to one million tons. In *McCoy-Elkhorn Coal Corporation v. EPA,* the plaintiff argued that EPA overstepped its authority under Section 125 in seeking to force Ohio utilities to use state coal.(120) An amicus brief filed by Congressman Carl Perkins (D-Ky), John M. Slek, Jr. (D-WVa.), Thomas Ashley (D-Ohio) and John P. Murtha (D-Pa.), asserted that Congress intended "region" in Section 125 to mean "a multi-state section of the country, bound by geographic and economic ties and showing an historic interdependence in the area of coal production and marketing."(121) The court held that the President or the Governor had the power to require a major discharager to use "locally or regionally available" coal and also to mitigate adverse economic consequences of fuel switching.

Despite the action-forcing provisions of the Act and the good intentions of the EPA bureaucracy, groups and others, it is obvious that Ohio's SO_2 problem has not been handled in an efficient or effective way from the standpoint of SO_2 emissions. The insertion of a purely political element in the form of Section 125 led to delays in determining applicable discharge requirements, the imposition of a proper level of costs, and finally to an indefinite delay in their implementation.(122) Section 4 provides a discussion of why the United States has a clean air act.

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4. Why Do We Have A Clean Air Act; Why Have One at All?

From the discussion of common law nuisance actions, the various obstacles to bringing public and private nuisance actions, and the status of the Clean Air Act for stationary sources in Ohio, it is at least questionable that the Clean Air Act affords environmental protection superior to the common law. One might ask why do we have this Clean Air Act or why should we have one at all? Several arguments are offered in this regard.

4.1 Technical Complexity of Abatement

One argument for having a Clean Air Act is that the technical complexity of abatement activities places the courts at a disadvantage in common law nuisance actions. Due to the dispersion characteristics and physical/chemical relationships governing air pollution the determination of whether a violation of "reasonable" behavior requires precise specifications of allowable discharge levels. Obviously, technological specifications are not an area which the courts might be expected to have a comparative advantage. The Clean Air Act may be explained as a legislative innovation to specify and enforce technological abatement prescriptions, and therefore a mechanism to define what constitutes an "unreasonable" invasion/interference. The enforcement role of the judiciary might be satisfactory if the courts did, in fact, limit their scrutiny and directives to the determination of whether compliance with agency prescriptions occurs or whether agency directives are "arbitrary and capricious."

However, by traditional standards, the extent of judicial intervention in the implementation of the Clean Air Act has been nothing short of amazing. In dealing with the Clean Air Act, the courts have held that:

- Pollution sources install and state/local agencies require continuous technological controls rather than intermittent or dispersion enhancement techniques (e.g., tall smoke stacks) for meeting ambient air quality standards;
- State/local and federal agencies consider "economic and technological feasibility" when constructing compliance schedules for sources violating the Act;
- EPA prevent the "significant deterioration" of clean air areas by imposing additional restrictive controls on all new sources of pollution.;

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- plans be promulgated by EPA and the states to reduce the amount of vehicular traffic in major cities;
- air-borne lead emissions be controlled throughout the country.

The Clean Air Act has not moved the courts away from mixing technological judgments about the reasonableness of requirements at the state/local and federal levels. As in nuisance actions, the courts are still balancing economic costs and economic damages to come up with a ruling on abatement activities.

4.2 Mass Production Requires Uniformity of Requirements for the Automobile Industry

Due to its mass production characteristics and national market, the automobile industry would not want to be subject to meeting different emissions standards in each of the 50 states. Air pollution legislation prior to 1970 left the setting of ambient air quality standards and emission standards for stationary and mobile dischargers to the states. The 1970 Clean Air Act limited the discretion of the states to the selection of control strategies for existing sources and various types of transportation control measures.(123) The states were stripped of the power to determine the ambient air quality standards and automobile emission standards. They could, however, set the standards for automobile emissions at more stringent levels than the federal standards. California is the one state which has more stringent standards than federally required for a number of air pollutants.

Until 1977, a waiver of federal preemption could only be obtained by a state if the relevant standard was more stringent at every level than the comparable federal emission limitations. In 1977, Congress amended the Act to provide greater deference to the states to develop their own control programs by allowing standards that are in the aggregate as strict or stricter than the federal emission limitations.(124) Some specific state standards may in fact be less stringent than federal standards. However, this has recently been changed. In *Ford Motor Company v. EPA*, the D.C. Court of Appeals held that cars meeting the less stringent California standards could not be marketed outside California unless they meet federal standards.(125)

Ford Motor Company completed the federalization of the

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Act. Although the federal automobile emission standards are argued to be stringent, once a manufacturer meets them it means that the producer can operate in each of the 50 states. By federalizing the approach to air pollution, the problem necessarily becomes one of technological specification. Consequently, there may be an incentive on the part of automobile manufacturers to be assured of a national market by only having to meet one preemptive set of emission standards.

4.3 Monopolization of Enforcement at the Federal Level

A final argument is offered that the federalization effort represented an attempt to monopolize/centralize enforcement of the private remedies available in common law. Recent experience in the Federal Water Pollution Control Act indicates that this may indeed be the case for private remedies. In *Middlesex County Sewerage Authority v. National Sea Clammers Association,* the Supreme Court held that the Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act, which expressly authorize private persons to bring citizen suits for injunctive relief from statutory violation, do not implicitly create private right of action for damages or injunctive relief, independent of those express remedies in the two Acts.(126)

Concluding Comments

This paper has compared the remedies for individual actions to address air pollution problems that are available under U.S. common law and the U.S. Clean Air Act. Section 1 provided a discussion of the common law remedy of nuisance. It concluded that private nuisance actions are adequate for certain types of air pollution problems while noting significant difficulties for individual plaintiffs. Section 2 described the statutory framework and private remedies provided in the U.S. Clean Air Act. In section 3, a case study of the regulation of electric utilities in Ohio, showed that the efficacy of the Clean Air Act over private remedies was indeed questionable. Despite Clean Air Act provisions and the good intentions of the EPA bureaucracy, environmental groups, and others, it was concluded that Ohio's SO_2 problem was not handled effectively. In section 4, the question was posed: Why do we have a Clean Air Act? Why should we have one at all? Several possible explanations

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or justifications were advanced: the technical complexity of judicial enforcement of industrial abatement activities; the need for uniform emission requirements for mass production industries; and the monopolization of enforcement efforts at federal level.

After living with the consequences of environmental quality management legislation for over a decade, the United States has learned that the environment can in fact be managed and that natural resources can be protected. The United States' experience also shows that the cost-effectiveness of some approaches in bringing about the attainment of environmental quality management goals are questionable. As this paper has shown, the development of responsible environmental quality management programs requires a close look at the costs and benefits as they affect specific groups in society. It is not enough that we argue for balancing the benefits of environmental quality with their costs, we must also be aware of the distribution of both benefits and costs.

Because of cultural, political, educational, and economic differences, not all nations will view or weigh the benefits and costs of environmental quality management in the same way. However, it is critical in improving environmental quality management techniques and approaches that diverse experiences be shared.

FOOTNOTES

(1) The United States is now in the early stages of developing market-based approaches. See, e.g., Brady, G.L., "Emissions Trading in the United States: An Overview and the Technical Requirements," 17 *Journal of Environmental Management* 63 (1983).

(2) See generally: Restatement (Second) of Torts § § 519, 520 (1938).

(3) Blackstone.

(4) Clean Air Act, 42 U.S.C. § 7400 et seq. (1977).

(5) 42 U.S.C. § 7604.

(6) See e.g., *State v. Galaxy Chemical Co.*, 1 ERC 1660; *Capurro v. Galaxy Chemical Co.*, 2 ELR 20386; *Commonwealth v. U.S. Steel Corp.*, 1972 Equity No. 1550 (Pa. Ct. C.P. Allegany County 1972).

(7) F. Harper and F. James, The Law of Torts, Section 1.18 (1956).

(8) Prosser, Private Actions for Public Nuisance, 52 Va. L. Rev. 997 (1966).

(9) 68 So. 2d 382 (Fla. 1953).

(10) 203 Misc. 26, 115 N.Y.S. 2d 632 (Sup. Ct. 1952), 30 S.E. 2d 537 (1944).

(11) 87 P. 2d 195 (1939).

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(12) *Baker v. Carr,* 369 U.S. 186 (1962); *Flast v. Cohen,* 392 U.S. 83 (1967).

(13) Hashims, Private Nuisance Law: Protection of the Individual's Environmental Rights, 8 Suffolk L. Rev. 1162 (1974).

(14) The learned judge here cited *Canandaigua v. Foster,* 50 N.E. 971 (1910); Harper and James, op. cit. at 67.

(15) *Timlin v. Standard Oil Co.,* 27 N.E. 786 (1891).

(16) *Fletcher v. Rylands,* 159 Eng. Rep. 737 (1865).

(17) Restatement (Second) of Torts § 821 C(1).

(18) Restatement (Second) of Torts § 821 C(2)(e).

(19) U.S. Const. Art. III, § 2.

(20) For a discussion of the issue of standing see generally, Recent Decision, 40 Brooklyn L. Rev. 421 (1973); Van Horne, Citizen Organizations Intervening in Federal Administrative Proceedings: The Lingering Issue of Standing, 51 Bost, U. L. Rev. 403 (1971); Jaffe, Standing Again, 84 Harv. L. Rev. 633 (1971); Davis, the Liberalized Law of Standing, 37 U. Chi. L. Rev. 450 (1970).

(21) See Rothstein, Private Actions for Public Nuisance: The Standing Problem, 76 W.Va. L. Rev. 453 (1975); McCann, Standing: Who Speaks for the Environment, 32 Mont. L. Rev. 130 (1971).

(22) See n. 20, supra.

(23) Black's Law Dictionary (4th Ed. Revised 1968).

(24) 397 U.S. 150 (1970).

(25) Ibid.

(26) 397 U.S. 159 (1970); For the debate concerning the Administrative Procedure Act, see K. Davis, Discretionary Justice: A Preliminary Inquiry (1969); and Jaffe, Discretionary Justice: A Preliminary Inquiry, 14 Vill. L. Rev. 773 (1963), reviewing Professor Davis' book.

(27) See n. 24, supra.

(28) 403 F. 2d 175 (D.C. Cir. 1968).

(29) Ibid.

(30) 428 F. 2d 1093 (D.C. Cir. 1970).

(31) Ibid.

(32) 510 F. 2d 796, 801 (1975).

(33) Ibid.

(34) 392 U.S. 83 (1968).

(35) Ibid.

(36) 354 F. 2d 608 (1965).

(37) Ibid.

(38) Ibid., 616.

(39) 425 F. 2d 97 (2d Cir.) (1970).

(40) 270 F. Supp. 650 (S.D. N.Y. 1967).

(41) 428 F. 2d 1093 (D.C. Cir. 1970).

(42) 346 F. Supp. 189 (D.D.C. 1972), see e.g., Collins, 42 Geo. Wash. L. Rev. 991 (1974).

(43) 346 F. Supp. 189 (D.D.C. 1972).

(44) 412 U.S. 669 (1973).

(45) 412 U.S. 669, 688 (1973).

(46) Restatement (Second) of Torts § 822 (1979).

(47) *Miami v. Coral Gables* (Fla. D.C. App.), 1 ERC 1184; see also *Maryland v. Galaxy Chemical,* 1 ERC 1660.

(48) 2 ELR 20016 (1971).

(49) Restatement (Second) of Torts § 822; see e.g., *Turner v. Big Lake Oil Co.,* 96 S.W. 2d 221 (1936), The court imposed strict liability for the escape of salt water from ponds constructed for use in the operation of an oil well.

(50) 3 ERC 1396.

(51) Restatement (Second) of Torts § 325D.

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(52) *Farmington v. Scott,* 132 N.W. 2d 607 (1965).
(53) *Nitram Chemical v. Parker,* 200 S. 2d 220 (1967).
(54) See e.g., *McLane v. Northwest Natural Gas Co.,* 467 P. 2d 635 (1970); *Spano v. Perrini,* 25 N.Y. 2d 11 (1969).
(55) *Bortz Coal Co. v. Air Pollution Commission,* 1 ELR 20393.
(56) *Cook Industries, Inc. v. Carlson,* 334 F. Supp. 809 (1971).
(57) Ibid.
(58) 1 ERC 1693.
(59) 229 P. 306 (1924).
(60) Ibid., 308.
(61) See e.g., *Boomer v. Atlantic Cement Co.,* 1 ERC 1175; *Madison v. Ducktown Sulfur* 83 S.W. 65 (1904).
(62) See, Rodgers, *Environmental Law* 117 (1977).
(63) See, e.g., *Reserve Mining Co. v. U.S.,* 519 F. 2d 492 (1975); *Spur Industries v. Del Webb,* 494 P. 2d 700 (1972); *Vowinckel v. N. Clark and Sons,* 13 P. 2d 733 (1932).
(64) James, Memorandum on the Element of Fault in Private Nuisance, in Restatement (Second) of Torts, App. A, at 131, 156 n. 43 (Tent. Draft No. 16 (1970)).
(65) 158 F. 225, 234 (8th Cir. 1907).
(66) 258 N.Y.S. 229 (1932).
(67) 132 N.E. 2d 313 (1955).
(68) See, e.g., A.M. Freeman, II, *Air and Water Pollution Control: A Benefit-Cost Assessment,* John Wiley and Sons, N.Y., 1982.
(69) 109 A. 2d 310 (1954); 6 A. 453 (1886).
(70) 83 S.W. 65 (1904).
(71) Ibid.
(72) 118 P. 928 (1911); 807 (9th Cir. 1884).
(73) In *Shatz v. Abbott Laboratories,* 3 ERC 1889, a theater owner was awarded $3,750 in lost receipts in a judgment for damages against a factory which emitted noxious odors.
(74) 226 F. Supp. 169 (D.C. Or. 1963).
(75) 124 P. 692 (1912).
(76) 43 A. 2d 15 (1945).
(77) 6 N.W. 2d 752 (1942).
(78) 81 N.E. 549 (1907).
(79) 35 S. Ct. 752 (1916).
(80) See n. 61, supra.
(81) 101 N.E. 805 (1913) damages to a farm from pulp mill of $100 per year.
(82) 2 ERC 1183.
(83) 42 U.S.C. § 7409 (1977).
(84) 42 U.S.C. § 7411 (1977).
(85) 42 U.S.C. § 7410 (1977).
(86) 42 U.S.C. § 7412 (1977).
(87) 42 U.S.C. § 7410 (1977).
(88) 42 U.S.C. § 7410(e).
(89) 42 U.S.C. § 7413.
(90) 42 U.S.C. § 7604.
(91) 40 CRF † 52, 1870.
(92) 37 *Federal Register* 10886, May 31, 1972.
(93) 39 *Federal Register* 13542, April 15, 1974.
(94) 5 ERC 1611 (1973).
(95) 42 U.S.C. § 7410.
(96) Pedco Environmental, Inc. (1980) Analysis of the Emission Reductions, Air Quality Changes and Institutional Impacts Resulting from the Implementation of Selected Policy Alternatives, Ohio River Valley Regional Study, Report to the National Commission on Air Quality.

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(97) *Union Electric Co. v. EPA*, 427 U.S. 246 (1976).
(98) 3 ELR 20701.
(99) 427 U.S. 246 (1976).
(100) Ibid.
(101) Ibid.
(102) Ibid.
(103) Ibid.
(104) Draft Final Report "Potential Impacts on the Ohio Coal Market: Ohio Utility Compliance with Applicable Air Emission Limitations: Section 125 Study."
(105) 42 U.S.C. § 7425.
(106) *McCoy Elkhorn Coal Corporation v. EPA*, 13 ERC 1025 (1979).
(107) See note 104.
(108) See note 104.
(109) Amicus Brief, *McCoy Elkhorn Coal Corporation v. EPA*, 13 ERC 1025 (1979).
(110) Ibid.
(111) Ibid.
(112) Ibid.
(113) Ibid.
(114) EPA Press Release, Washington, D.C., January 13, 1980.
(115) EPA Press Release, Washington, D.C., February 26, 1980.
(116) "Ohio Section 125 Study: Regional Economic Impact Analysis." See n. 104, supra.
(117) Ibid.
(118) Ibid.
(119) Ibid.
(120) 3 ERC 1025.
(121) See n. 104, supra.
(122) For a discussion of the broader issues involved in EPA policy of full scrubbing of low sulfur coal, see Ackerman and Hassler, "Clean Coal/Dirty Air," Yale University Press, New Haven (1981).
(123) 42 U.S.C. § 1857 et seq.
(124) 42 U.S.C. § 7543 (1977).
(125) 13 ERC 1529.
(126) 49 LW 4783.

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JUDICIAL ACTIVISM AND THE CONSTITUTIONAL AMENDMENT PROCESS

By Maxwell A. Miller and Nancie George

"Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."
Proposed Equal Rights Amendment – 1972

Few issues in recent American history have caused such bitter divisiveness as the proposed Equal Rights Amendment (ERA) to the United States Constitution.(1) Proponents asserted that the amendment would simply assume that the government treat women fairly or non-arbitrarily. Opponents asserted that treating women on exactly the same basis as men would lead to a "parade of horribles" including sexually integrated combat forces, restrooms, and legalized rape.(2) Although the ERA proposal did not generate sufficient political support to become the twenty-seventh amendment to the United States Constitution, the attempt to pass the amendment resulted in a highly controversial and legally significant lawsuit, *Idaho v. Freeman*.(3)

Freeman dealt with the constitutional amendment process as outlined in Article V of the United States Constitution.(4) Article V states that there must be a concurrence by two-thirds of the members of both houses of Congress and ratification by the legislatures of three-fourths of the states. It does not specify how long states have to ratify any given amendment. For ERA, as for other recently proposed amendments, Congress designated a seven-year limitation.(5)

In March of 1972, Congress passed the proposed ERA and sent it to the states for ratification. Most assumed the states would quickly ratify the proposal. In the first year, the ERA came within three states of the necessary majority, but then stalled, never to gain another ratification. Worse yet for ERA proponents, five legislatures rescinded their previous ratifications.(6)

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On March 22, 1979, the seven year ratification period for the ERA expired. The amendment was still three states short of being ratified, not counting the five rescinding states. The previous year, on October 6, 1978, Congress attempted to forestall ERA's political demise by taking an unprecedented step in extending the time for ratification. The extension, approved by less than a two-thirds majority of the House and Senate, gave ERA proponents a three year reprieve in which to persuade the unratified state legislatures.(7) The legality of this unprecedented act was heatedly disputed.

In May 1979, two months after the extension went into effect, a group of legislators from the State of Idaho (a rescinding state) and the State of Arizona (a non-ratifying state) sued the General Services Administrator(8), claiming that the rescissions were valid, and the extension invalid. *Freeman* decided these issues in favor of the plaintiff legislators.

Those who followed the last gasps of the ERA undoubtedly recall the public outcry resulting from Judge Callister's ruling. *Freeman* held that states could rescind their prior approvals of a constitutional amendment before three-fourths of the states ratified; and, that Congress had no authority to extend the time period for consideration of the amendment after having set it initially. Callister's lengthy, well-considered analysis was almost universally ignored as critics competed to author the most vivid denouncements.

Billed as the "death knell" for the proposed ERA amendment, newspapers were filled with editorials characterizing the opinion as improper judicial decision-making or judicial activism. Columnist Ellen Goodman, for example, quoted Professor Lawrence Tribe of Harvard (later chief counsel for the National Organization for Women) as saying the Callister opinion was "a naked exercise of unjustified judicial power."(9) Picking up the same "judicial activism" theme, other critics with equal rhetorical flare complained that a single judge's ill-grounded and unnecessary intervention into politics had derailed the amendment process and frustrated millions. The Chicago Tribune stated that "[i]f the amendment is not ratified, its proponents will be able to put at least part of the blame on [Callister's] inappropriate decision."(10) Eleanor Smeal, then President of the National Organization for Women, said at one news conference that Judge Callister had "stepped on the will of the people."(11)

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Viewing the decision solely as a threat to ERA ratification, while virtually ignoring its legal analysis, amendment supporters immediately urged the Justice Department to appeal the ruling.(12) NOW argued for expedited Supreme Court review of the decision, stating that "[s]uch prompt action by this Court would nullify the district court's unprecedented intervention in the amendment process."(13)

Mislabeling of the Callister opinion as judicial activism encouraged liberal commentators to join critics in blasting conservatives who supported the decision.(14) To further confuse the issue, a leading conservative, United States Attorney General William French Smith, on a number of occasions had officially spoken out against judicial policy-making.(15) For the Reagan administration to pursue an appeal undoubtedly confirmed the widely-held concept that the Callister opinion was improper judicial intervention in the ratification process(16), just as the columnists said.

This article examines these charges of judicial activism, realizing that the term's meaning is imprecise and confusing. The article does not attempt to abstract new ideas or bridge gaps between existing theories.(17) Instead, if offers *Idaho v. Freeman* as a well-reasoned, apolitical decision which represents an outstanding example of how to interpret vague and sweeping constitutional phrases within the scope of the framers' intent.

Though *Freeman* arose in a dispute over ERA ratification, its principles should not be forgotten. Over one hundred constitutional amendments were introduced in the ninety-seventh session of Congress, including another ERA proposal, introduced with the same language as its predecessor in July, 1982.(18) Hence, defining a judge's proper role in reviewing constitutional phrases found in Article V is crucial if we are to conduct ourselves in an orderly manner, giving procedural safeguards to all substantive propositions.(19)

Confusing Judicial Activism with Proper Judicial Review in *Idaho v. Freeman*

Because *Freeman* stymied a popular cause it was given the same "off-with-your-head" greeting as a messenger bearing unpleasant news to his general. The criticisms were typically an unthinking fusion of stated political philosophy (favoring the amendment) with an unstated judicial philosophy (dis-

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favoring any process that would bar the amendment's passage). This result-oriented approach was disastrous for at least two reasons. One, it compounded public confusion about the judiciary's proper role in society. Two, it led others to condemn appropriately decided issues simply because the result was unpopular. With respect to the Callister opinion, the repeated accusation was that the Judge decided as he did because, as a Mormon, he was personally opposed to passage of the ERA, and had no other choice as an active Mormon but to surreptitiously sabotage ERA from the federal bench.(20)

To unravel the confusion over judicial activism in general, and accusations of Callister's judicial activism, in particular, necessitates, as a first step, a recognition that the plaintiffs and defendants in *Freeman* had entirely different concepts of judicial review.(21) Both concepts, as will be explained, have a certain validity to them, but the point to be stressed here is that they are both rooted in subjective value systems.

Like all statements about how society "ought" to function, theories of judicial review begin with basic assumptions that are hard to verify because they are subjective. For example, if someone asserts that a court "ought" to enforce natural rights, there is no way to prove him wrong. He is not making a statement about what "is," only about what "ought to be." It is like saying John ought not to steal. As a matter of fact, John may or may not be a thief, but inquiry into objective facts says nothing about what John "ought" or "ought not" to do.

The latter type of inquiry is ultimately a value judgement. This is not to say that objective criteria cannot be of any assistance in reaching a conclusion. For example, we may decide that John "ought not" to steal because stealing is against the law or we may decide that John "ought" to steal because the risk of being caught is slim and thieves ordinarily make sizeable, untaxed incomes. Ultimately, however, the answer depends upon one's values or beliefs. So it is with judicial review. Many favor an activist Court because it seems to promote values they cherish. Likewise, efforts to strip the Court of jurisdiction are often rooted in a mistrust of the judiciary's political leanings.

A third possibility, advanced by Judge Callister in *Idaho v. Freeman*, is that there should be a distinction between popular or political beliefs and judicial review. Accepting that distinction promotes democratic values. It upholds the functional difference between law-making and law-interpretation, the

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latter being the proper role for the judiciary. Given that premise, one can recognize true judicial activism because the term means that a court has undertaken the proscription of laws. One can likewise recognize a decision that is not a result of judicial activism, despite the moans and groans of those who do not like the outcome.

Notwithstanding attempts to link *Freeman* with the merits of the ERA, Judge Callister made it clear that the merits of and the politics behind the ERA were irrelevant to a resolution of the issues before him. His opinion thus exemplifies what is often referred to as the "interpretivist" model, the theory that the only legitimate role of a judge is to enforce the value choices embodied in the Constitution or those which are necessarily implied.(22)

Considered dispassionately, labeling the Callister opinion "a naked exercise of unjustified judicial power" is nonsense.(23) As noted, one major criticism of the *Freeman* decision was that Judge Callister had prematurely intruded into the political process. The issues, in other words, were not "ripe" for review. Essentially ripeness means that the controversy must be sufficiently concrete and focused so that the court can adequately evaluate the merits of each party's position.(24) Ripeness in *Freeman* can be and was argued aggressively by both sides. But that is beside the point. *Deciding* "ripeness" issues is a routine exercise for federal courts.(25) Why it was "unjustified" for Callister to decide an issue federal courts are supposed to decide is not readily apparent. Inevitably, this criticism reduces to the argument that Callister reached the "wrong" result on ripeness.

Another major criticism was that the issues in the ERA opinion were immune from judicial scrutiny, that they involved "political questions," questions calling for policy judgements and thus inappropriate for judicial consideration.(26) Specifically, this criticism alleged that the constitutional amendment process is vested with the legislature and that courts lack the power to decide both the deadlines for ratification and whether to count state rescissions.(27) Deciding which branch of government has the power to decide who has control over the amending process, however, can never be a "political question." The answer depends only upon an interpretation of the constitution, not a balancing of political factors.(28) Again it appears that the actual criticism is not that Callister decided, but that he

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reached the "wrong" result.

A final criticism charged that Judge Callister acted on his own personal, or religious, beliefs in deciding the ERA opinion.(29) Such accusations of judicial impropriety implicitly raise the judicial activism issue. The best response to that charge is the opinion itself which contains a highly dispassionate, well-reasoned analysis of the issues. The manner in which Callister approached the legal issues makes this accusation not only insulting and petty, but moot.

These criticisms of the ERA opinion essentially raise issues which were first argued over a hundred years ago.(30) In 1803, Chief Justice John Marshall declared in *Marbury v. Madison* that the federal judiciary has the power to say what the constitution means and to invalidate any conflicting acts of Congress.(31) *Marbury* has become a cornerstone of American jurisprudence, though the decision was not without critics. Thomas Jefferson thought the case should be dismissed as dictum,(32) that is, unnecessary ramblings. Because the Marshall Court had not confined itself to decide what was constitutional for the parties before the Court, Jefferson believed that Marshall had reduced the constitution to a scrap of paper. The crux of Jefferson's complaint was that the constitution did not expressly give the judiciary power to mold the government in whatever image happened to strike its fancy. Though Jefferson did not use the term "judicial activism," modern criticisms are variations of his theme.(33)

Within the last thirty years federal courts have begun combatting perceived social evils with newly discovered "fundamental rights."(34) As a result, complaints about judicial activism have correspondingly intensified. The backlash against activism is evidenced not only in misplaced criticism of the ERA decision, but by the record number of bills purporting to curb judicial power.(35) These bills, now pending before Congress, range from the wholesale withdrawal of federal court jurisdiction to hear certain issues to removal of the courts' power to order controversial remedies, like school busing. Such bills are symptomatic of an underlying impass over proper constitutional interpretation, an impass cutting across political lines.(36)

Essentially, the current controversy over judicial activism involves a question of whose values to apply and how they are derived. No one wants to invalidate judicial review; likewise, no one wants the other extreme, judges to impose their own

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values. Simply put, the problem is to find an appropriate way to allow a court power to strike down unconstitutional laws, yet restrain its power to exceed constitutional limitations.(37) Finding the line between judicial activism and judicial review is fraught with complexities because constitutional phrases like "equal protection" are imprecise, inherently inviting judicial definition. The avalanche of law review articles attempting to weigh these complexities neither provide a definite framework for guiding courts faced with open-ended questions nor provide society with certain guidelines against which to measure the propriety of judicial decision-making in such situations.(38)

The confusion over the proper role for courts is worsened when decisions like *Idaho v. Freeman* are falsely criticised as judicial activism. *Freeman* is actually an excellent illustration of proper judicial review, and, consequently, worth careful study.

How the Callister Opinion Was Actually Decided

In addressing each issue of the case, Judge Callister used the following approach. First, he went to the Constitution's text for guidance. If the language was ambiguous or unclear, he interpreted it by reference to the framer's intent, as evidenced by their words and announced in Supreme Court opinions. He gave effect to the language's evident purpose. Finally, he made it clear that the rules he was enforcing applied to all amendments, regardless of political content. The ERA, in short, had no bearing on the outcome. The opinion announced neutral principles.

For example, in resolving the recession issue, Callister declared that the states' authority is derived solely from the Constitution itself. Since article V provides only that the proposal becomes part of the constitution "when ratified," without defining the term, it was necessary to interpret the language. Here the Judge outlined three theoretical approaches, but concluded that the one binding upon him was the one consistent with the constitutional purpose as explained by Alexander Hamilton and a prior Supreme Court opinion. Both are to the effect that "ratification" means a "united desire"(39) or "contemporaneous"(40) consensus of the state legislatures. Binding states to their original position risks enforcing a contrived "united desire" for change. In Callister's words, "The

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Constitution through article V gives technical significance to a state's ratification at only one time – when three-fourths of the states have acted to ratify."(41) This ensures that a ratification by three-fourths of the states reflects the states' contemporaneous position.

For extension, the Judge again turned to the Constitution's language. "Congress," he said, "has no power to act with regard to an amendment" outside article V.(42) He acknowledged that the congressional power to fix a definite time period in which ratification must take place was a necessary implication from article V, an implication previously recognized by the Supreme Court. That did not mean Congress had power to reset the time once the proposal had been sent to the states. "In order to fulfill the constitutionally implied purposes for fixing a time limitation for ratification, the congressional determination of a reasonable period once made and proposed to the states cannot be altered."(43) By adhering in a like fashion to the text of the Constitution and the clear implications which necessarily ensue, Callister disposed of every issue presented in *Freeman* and displayed a superior form of judicial decision-making.

The Proper Role of the Court in the Constitutional Amendment Process

To say generally that a court has exceeded its legitimate authority is unavoidably problematic because the scope of a court's legitimate authority is debatable. The constitution in article 1, section 1, states that the Supreme Court is vested with the "judicial power of the United States" and then distinguishes that power from legislative powes. The explicit role of the Court is an adjudicative function: federal courts are to decide only "cases" and "controversies." They are prohibited from giving advisory opinions and exercising legislative powers.(44) Thus, it can be said that the Supreme Court is exercising legitimate authority when it exercises judicial review in an adjudicative manner; conversely, it exceeds that authority when it supplants the legislature in formulating policy.

The difference between originating policy and enforcing it is, largely, a functional question. Courts enforce policy when they compare the Constitution's text with a challenged statute and nullify the latter when it is discrepant with the former. But

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that is an overly simplistic summation. In 1819, the Court speaking again through John Marshall, suggested that the power of judicial review necessarily goes beyond analysis of constitutional text.(45) When the text is either incomplete or ambiguous, judges must fill in the blanks.

Whether they are free to fill the void from abstract sources beyond the text or context of the constitution depends upon one's allegiance to the concepts embodied by interpretivism or non-interpretivism school.(46) Non-interpretivism, the school of thought which favors expansive judicial review, encompasses at least three forms of review which all retain at least some connection to the constitutional text. But their actual normative content is not derived from the language of the constitution and need not be harmonized with the intent of the framers.

Thomas Gray in *Do We Have An Unwritten Constitution*,(47) describes the reasoning of the three most prevalent forms of non-interpretative judicial review. One view is that the Supreme Court justices have a license to read normative content into sweeping phrases, like "due process" and "equal protection," so as to prevent legislative infringement on individual rights the judges currently deem fundamental.(48) Another view is that judges should apply contemporary social and moral values to specific provisions, even if this restrains legislative initiative and even though the framers would have read these provisions as implying different or narrower restraints.(49) A final mode of non-interpretative judicial review allows a court to read into a general provision a body of constitutional law developed under other provisions that would not otherwise apply to the case at hand. Gray cites as an example *Bolling v. Sharpe*(50), in which the Court applied the fourteenth amendment equal protection doctrine, intended by its framers to apply only to the states, to the federal government through fifth amendment due process clause.

The problem with the open-ended approach of the non-interpretavists is that it fails to provide a rationale for limiting adjudicative authority.(51) In contrast, the interpretavists take the position that the text of the Constitution and values which can be reasonably inferred are natural limits on the authority of courts.(52)

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The Institutional Importance of Distinguishing Between Political Dissatisfaction with a Decision and Judicial Activism

Requiring a court to base its decision-making authority on the text and reasonable inferences of the Constitution has practical ramifications. The public accepts and supports the idea that courts enforce value choices attributable to the Constitution's framers, not to the individual Court members. Implementing values rather than inventing them allows the court to function within the common understanding of a democratic society. Jefferson once stated that:

> The Constitution. . . is a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please. It should be remembered, as an axiom of eternal truth in politics, that whatever power in any government is independent is absolute also . . .Independence can be trusted nowhere, but with the people in mass.(53)

The understanding is that law is legitimate only insofar as the people who devise the law (the legislative branch) and those people who enforce the law (the executive) are different from those who interpret it (the courts). This sense of legitimacy underlies the many functional checks and balances prescribed in the Constitution and serves as actual, not merely theoretical, safeguard against tyranny.

The extent to which the courts control policy decision making means that to a lesser extent the people do not. By allowing any judicial review, society in effect has already consented to some undemocratic aspects of government.(54) According to Robert Bork,(55) consent to any governing authority by the courts imposes greater obligation upon the Court to demonstrate in reasoned opinions that it has valid, neutral principles derived from the Constitution for its constitutional decisions. Otherwise, according to Bork, the Court becomes an uncontrolled naked power organ.(56)

A valid theory or principled decision is one Herbert Wechsler describes as resting "on reasons with respect to all the issues in a case, reasons that in their generality and their neutrality transcend any immediate result that is involved."(57) If the Court has no such neutral principle for its decision, but merely imposes its own value choices, or what is worse, pretends to have a

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theory, but actually follows its own predilections, the Court violates the premise which justifies its power. The latter situation is considered worse because it represents in a sense fraud on the public. It also tends to perpetuate the gap between those who know that a decision may have no constitutional underpinnings versus those who on faith accept that the courts are operating as originally conceived.

Viewing the Court's role as one which must be legitimate within society fails to support the type of reasoning popular among those who support judicial activism: decisions first, principles later.(58) As Alexander Bickel aptly stated, "the process of the coherent, analytically warranted, principled declaration of general norms alone justifies the court's function. . ."(59)

What these theories mean in practice is that a judge must stick to the text, constitutional history and its fair implications, and not construct new rights. If these sources do not specify a value to be preferred and there is no principled way to prefer any one value over another, the legislature, rather than courts, should make the choice.(60)

Conclusion

Eventually a judicial breach of trust can come back to haunt the Court. As Alexander Bickel pointed out, the Supreme Court inherently has a quantitative limit on the number of major, unprincipled decisions that it can make. If the Court exceeds this limit it will "find that more and more of its pronouncements are unfulfilled promises [which] ultimately discredit and denude the function of constitutional adjudication."(61) This reflects the irony of judicial power: it ultimately rests on popular acceptance. Society, not the courts, implement judicial decisions.

To demand that the courts adhere to their proper tole in the constitutional amendment process, society must have a clear understanding about what they were designed to do, or at least an understanding of the difference between a decision based on the Constitution versus one based on values from external sources. Accusations of judicial activism are useful when they inform the public of an illegitimate basis for decisions. When inaccurate, as with the *Idaho v. Freeman* decision, the result is worse than unacceptable. It is potentially dangerous because it foments public denouncement of the type of judicial review essential for a stable democracy.

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FOOTNOTES

(1) As proposed on March 22, 1972, the amendment was intended to be "valid for all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several states within seven years from the date of its submission by the Congress . . ." H.J. Res. 208, 92nd Cong. 2d Sess. (1972).

(2) *See generally* R. Lee *A Lawyer Looks At the Equal Rights Amendment* (1980).

(3) 529 F. Supp. 1107 (D. Idaho 1981), *vacated*, 103 S. Ct. 22 (1982). The district court opinion was vacated on mootness grounds.

(4) "The Congress, whenever two thirds of both Houses shall deem it necessary shall propose amendments to this Constitution, which, . . .shall be valid . . .when ratified by the Legislatures of three-fourths of the several states . . ." U.S. Const. art. V.

(5) 117 Cong. Rec. 35305 (1971).

(6) *See supra* R. Lee note 2 at 37. By 1979, only thirty-five of a needed thirty-eight states had approved the proposal. Five (Nebraska, 1973; Tennessee, 1974; Idaho, 1977; Kentucky, 1978; and South Dakota, 1979) rescinded their approvals. Kentucky's rescission was vetoed by the lieutenant Governor. South Dakota's rescission is more appropriately described as a termination.

(7) On October 6, 1978, Congress, by a simple majority vote, extended the deadline to "not later than June 30, 1982" H.J. Res. 638, 95th Cong. 2d Sess. (1978). By June of 1982, no additional states had approved the proposal.

(8) The General Services Administration is entrusted with the duty of counting ratifications and proclaiming an amendment as part of the Constitution when a sufficient number of states "may have ratified" the proposal. 1 U.S.C. § 106(b).

(9) Rocky Mountain News Jan. 2, 1982, at 53, col. 3. Goodman's column, which quoted Professor Tribe, compared the ERA to a hospital patient and Callister as its killer:

> For the past year, people have hovered around the body of the Equal Rights Amendment, asking each other in hushed words, 'Is it dead yet? . . .' Last week [Judge Callister] strode into the sickroom with a 72-page pillow in his hands. Attempting to smother the poor thing with words, he declared that the amendment had actually died two years ago . . .Just imagine, if you will, the gasps of horror among conservatives if a liberal judge had casually intervened this way; brushing aside the Constitution in his haste to get his hands on the patient.

Id.

(10) Chicago Tribune, Jan. 16, 1982, quoted in 13 Editorials on File 103 (1982). *See also* Chicago Defender, Jan. 19, 1982, (Callister opinion will discourage ratification of the ERA). *Id.* at 102.

(11) New York Times, Dec. 24, 1981, at A-12, col. 4.

(12) *See, e.g.*, The Denver Post, Jan. 9, 1982, at 2B, col. 1. ("To remove the legal cloud Callister's decision has imposed, the Supreme Court should agree to NOW's request for a speedy ruling."); Buffalo Evening News, Jan. 31, 1982, quoted in Editorials on File, *supra* at 102. (The Supreme Court granting of a stay of Callister's ruling lightened formerly grim prospects for ratification of ERA). Siding with this position, the American Bar Association reminded the Supreme Court that "ratification of the ERA, a goal to which the ABA is committed, is threatened by the decision of the district court." Amicus Brief of American Bar Association at 6, Nos. 81-1282, 81-1283, *Idaho v. Freeman, supra* note 3. Amicus Brief for National Organization for Women, No. 81-1282, 81-1283 at VI, *Idaho v. Freeman, supra* note 3.

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(13) Brief for National Organization for Women, Nos. 81-1282 at VI, *Idaho v. Freeman, supra* note 3. "[T]he interjection of the judiciary into the political process now threatens the entire ratification process . . .The district court's decision has undeniably impeded debate on the merits of the ERA."
Id. at 3 & 5.

(14) *See, e.g.*, Chicago Tribune, Jan. 16, 1982. "[I]t is . . .amusing to see the conservatives who have complained for years about judicial activism now praising so extreme an example of it."

(15) *See, e.g.*, Houston Chronicle, Nov. 6, 1981; The San Diego Union, Nov. 4, 1981; The Christian Science Monitor, Nov. 4, 1981 at 24, col. 2; The Des Moines Register, Nov. 6, 1981; Arkansas Democrat, Nov. 12, 1981.

(16) The reasoning behind the Justice Department's decision to pursue an appeal is inexplicable. Perhaps many in the Administration also chose to forego the demanding task of actually reading Callister's opinion, as columnist James Kirkpatrick recommended. Kirkpatrick, who did read the entire decision, opined that "[Because the] reasoning is so cogent, and [the] scholarship so impressive, . . .it is hard to imagine that appellate courts will reverse his decision." Rocky Mountain News, Jan. 3, 1982, at 73, col. 3.

(17) Exhaustive discussion of judicial activism has led to more confusion than consensus in understanding the term. Confusion results in part from using the term "judicial activism" to convey different ideas. As noted in one article, *A Comment on the Burger Court and Judicial Activism*, 52 Colo. L. Rev. 223, 224 (1981), the term is used to suggest political liberalism, a preference for a more active role for state courts, vigorous court definition of civil rights, and aggressive judicial policy-making.

(18) As of one count, forty-six of these amendments concerned the budget process; fifteen dealt with the terms of Congress; fifteen involved the election of the tenure of President; fourteen concerned abortion; four concerned the tenure of federal judges; nine involved discrimination issues; six dealt with prayer in schools; and one concerned the death penalty.

(19) The rescission issue is especially likely to recur. The problem has repeatedly frustrated a consistent amendment process beginning with the fourteenth and recurring with the fifteenth and proposed twenty-seventh amendments. Following ratification of the fourteenth amendment, a bill was introduced that would have made rescissions null and void. Cong. Globe, 41st Cong., 2nd Sess. § 28 (1869). The measure passed the House, but not the Senate. Cong. Globe, 41st Cong., 2nd Sess. § 5356 (1870); Cong. Globe, 41st Cong., 3d Sess. § 13811 (1871). More recently, the following bills have been initiated in Congress: S. 2307, 90th Cong., 1st Sess. (1967); S. 623, 91st Cong., 1st Sess. (1969); S. 215, 92nd Cong., 1st Sess. (1971). Most of the recent bills would have confirmed the states' right to rescind. None passed both houses, but the 1973 Senate version confirming the power to rescind passed 84-0.

(20) Both NOW and the United States Government tried to recuse Judge Callister because of his affiliation with the Church of Jesus Christ of Latter-day Saints (Mormon). The government made the first attempt to recuse Judge Callister in 1979. The occation marked the first time in federal jurisprudence history that a party sought to disqualify a judge because of his religious affiliation. *Idaho v. Freeman*, 478 F. Supp. 33 (D. Idaho 1979). Subsequently, then-Solicitor General Wade McCree decided not to appeal the recusal issue, despite the urging of his staff, because of his "firm opinion . . .that the religious beliefs or affiliations of a federal judge should not be the basis for an appeal in a case such as this, especially where the judge has forthrightly expressed his unequivocal ability and intent to decide the case *solely according to law*." Memorandum of Wade McCree, Jr. to the file (Nov. 28, 1978) quoted in 507 F. Supp. at 711, n. 2 (emphasis added). NOW evidently did not share the government's distinction between law and personal belief. Having

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been granted intervenor status, NOW once again attempted to recuse Judge Callister a year later. *Idaho v. Freeman*, 507 F. Supp. 706 (D. Idaho 1981). Callister's denial of NOW's attempt was later up-held by the Ninth Circuit.

(21) Counsel for NOW suggested at oral argument that the Court should rule in its favor because ERA was important to "the rights of those people who are supporting our position . . .This is a very important case to 53 per cent of the population of this country,". . *Idaho v. Freeman, supra* note 3, recorded at 285. The evident intent of NOW's argument is that the Court should rule to protect the "rights" of those favoring ERA. The judge's response was that "[i]t is important to 100 per cent of the population. We are all affected by it." He later elaborated that, "The importance of this amendment one way or the other, I think, has no bearing on what is the proper procedure of the adoption of the amendment." *Id.*

(22) The contrary view, noninterpretivism, is that courts should go beyond the set of references provided by the documents and enforce norms discoverable beyond the written text. *See generally* J. Ely, *Democracy and Distrust* (1980).

(23) *See supra* note 9.

(24) *See United Public Workers v. Mitchell*, 330 U.S. 75 (1974). The Supreme Court stated that a hypothetical threat is not sufficiently "ripe" for adjudication.

(25) This is not to say, however, that a mechanical test for deciding ripeness is recognized. The ripeness issue is discussed in *Freeman, supra* note 3 at 1121-23.

(26) *See generally* J. Novak, R. Rotunda and J. Young *Constitutional Law* (1978). *See also* Almond, *Running Out Of Time. Can the E.R.A. Be Saved*, 64 A.B.A.J. 1504 (1964). *cf.*, Rotunda, 64 A.B.A.J. 1507 (1978).

(27) The political question issue is discussed extensively in *Freeman, supra* note 3 at 1123-45.

(28) In *Goldwater v. Carter*, 444 U.S. 996 (1979), Justice Brennan wrote that "the [political question] doctrine does not pertain when a court is faced with the *antecedent* question whether a particular branch has been constitutionally designated as the repository of political decision-making power. . .The issue of decision making authority must be resolved as a matter of constitutional law, not political discretion; accordingly it falls within the competence of the courts." *Id.* at 1107.

(29) Columnist Ellen Goodman strongly implied that as a basis for the decision. "[A]s a former high official, he had already decided against the ERA for the Church, but he could still decide the case objectively for the state. Women's groups had expressed, uh, doubts. Well, all doubts are now swept aside . . .on the birthdate of Mormon founding father Joseph Smith [Judge Callister] single-handedly wiped out a prerogative of Congress." Rocky Mountain News, Jan. 2, 1982, at 53, col. 3.

(30) Ely states that the controversy over the proper role of judicial review in a sense pervades all of law. J. Ely, *Democracy and Distrust*, 1 (1978).

(31) 5 U.S. (1 Cr.) 137 (1803).

(32) *Thomas Jefferson on Constitutional Issues, Selected Writings, 1787-1825* at 38 (The Virginia Commission on Constitutional Government, ninth essay).

(33) According to Edward White in *Reflections on the Role of the Supreme Court: The Contemporary Debate and the Lessons of History*, 63 Judicature 162 (Oct. 1979), the principal justification for the court's power to review legislation has changed since *Marbury*. Originally, the concept of judicial review was tied to a belief that the law is a finite body and judges merely served as law-finders. The modern debate on the nature of the appropriate constraint on judges is based on law being seen as changing in response to new social values. *Id.* at 163-64.

(34) *See, e.g., Young v. Klutznik*, 49 U.S.L.W. 2235 (E.D. Mich. 1980) (case involving the census); *Caban v. Mohammed*, 441 U.S. 380 (1979) (case involving adoption); *Fricke v. Lynch*, 491 F. Supp. 381 (D.R.I. 1980) (homosexual partners must be permitted to attend high school dances); *Penhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1980) (treatment appropriate for mental patients); *Estes v. Metropolitan Branches of Dallas NAACP*, 429 U.S. 97 (1976) (failure of prison authorities to provide for prisoner's medical needs violates the eighth amend-

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ment); *United v. Jones*, 445 U.S. 480 (1980) (hearing required before inmate can be transferred from a prison facility to a mental hospital).

(35) One author observed that "[j]udicial authority is now spreading into administrative and legislative fields. Resentment of judicial activism is on the rise. Another historic power struggle is in the making as the feeling grows that now the courts have just gone too far." Houston Chronicle, Nov. 6, 1981.

(36) The late Justice Hugo Black's dissent in *Griswold v. Connecticut*, 371 U.S. 478 (1965), well demonstrates the non-partisan concern over judicial activism. Black was a "liberal" appointed by Franklin Roosevelt. One would assume his politics would lead him to agree with the *Griswold* majority in that laws banning the use of contraceptives are bad and therefore unconstitutional. Yet Justice Black, while agreeing that the ordinance was "offensive" and "uncommonly silly," thought one's political philosophy was a flimsy excuse for inventing a new constitutional basis for invalidating the law. Black argued that "judges [should not] determine what is or is not constitutional on the basis of their appraisal of what laws are unwise or unnecessary. The power to make such decisions is of course that of the legislative body." *Id.* at 512.

(37) *See* White, *Reflections on the Role of the Supreme Court: The Contemporary Debate and the 'Lessons' of History*, 63 Judicature 62 (1979).

(38) The remark by Professor Gunther, "one more dreary round of vacuous if not mischievous talk about self-restraint and activism," is representative of the despair shared by many commentators that the voluminous material written on the subject has failed to lead to solutions for the problem of judicial activism. Gunther, *The Subtle Vices of the "Passive Virtues" – a Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1 (1964).

(39) Hamilton wrote in Federalist 85 that "[W]hen. . .[the requisite three-fourths of the state are] *united in the desire* of a particular amendment, that amendment must infallibly take place." The Federalist No, 85 (A. Hamilton) at 525 (Mentor, 5th ed. 1961) (emphasis added).

(40) The Court in *Dillon v. Gloss*, 256 U.S. 368 (1921) stated that "ratification is but the expression of the people and is to be effecti e when had in three-fourths of the states. There is a fair implication that it must be sufficiently contemporaneous in the number of states to reflect the will of the people in all sections at relatively the same period. . ." *Id.* at 375.

(41) 529 F. Supp. at 1150.

(42) *Id.* at 1151.

(43) *Id.* at 1152.

(44) Although the Constitution itself says nothing about judicial review it is a reasonable inference which is supported by history, and is now firmly entrenched in our jurisprudence. Even in John Marshall's time, judicial review of legislative acts was an accepted function. *See* Baker, *John Marshall – A Life in Law* 381-414 (1974).

(45) "[The Constitution's] nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 395 (1819).

(46) *See* note 22, *supra*.

(47) 27 Stan. L. Rev. 703 (1975).

(48) Examples of that process are in *Bolick v. Carter*, 405 U.S. 134 (1972) (access to ballot); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969) (equality in voting); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right of privacy); *Lochner v. New York*, 198 U.S. 45 (1905) (liberty of contract).

(49) An example of this type of judicial review is *Trop v. Dulles*, 356 U.S. 86 (1958), where the Court decided that the eighth amendment prohibition against "cruel and unusual punishment" imposes evolving standards of decency on penal legislation.

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(50) 347 U.S. 497 (1954).

(51) *See, e.g.*, analysis by Choper in which he endorses the concept of validating "unmentioned" fundamental rights without indicating how judicial definition is to be circumscribed. Choper, *Judicial Review and the National Political Process. A Functional Reconsideration of the Role of the Supreme Court* 73-75 (1980). Professor Choper tries to allay fears of open-ended judicial review by arguing that society is better off because of the Supreme Court's existence. *Id.* at 79-80, 127-28. *Cf.* Nowak, Book Review, 68 Calif. L. Rev. 1223, 1228 (1980). (Author notes the harms resulting from a number of Supreme Court decisions).

(52) *See, e.g.*, R. Berger, *Government by Judiciary* (1977); Bork, *Neutral Principles and Some First Amendment Problems*; 47 Ind. L.J. 1 (1971). J. Ely, *Democracy and Distrust* (1981). The former two authors represent a more "text-bound" approach in contrast to those who would allow courts latitude to make judgements which do not violate democratic principles.

(53) Thomas Jefferson quoted by Bork, *The Struggle Over the Role of the Courts*, National Review, 1137, 1139 (Sept. 17, 1982).

(54) *See* Bork, *The Struggle Over the Role of the Courts*, National Review 1137, 1139 (Sept. 17, 1982).

(55) Robert Bork is currently a United States Court of Appeals judge in the D.C. Circuit.

(56) *See also* Bork, *Neutral Principles and Some First Amendment Problems,* 47 Indiana L. J. 107 (1971).

(57) Wechsler, *Toward Neutral Principles of Constitutional Law in Principles, Politics, and Fundamental Law* 3, 27 (1961).

(58) *See* A. Bickel, *The Least Dangerous Branch* (1962); Judge Learned Hand once commented that "it would be most irksome to be ruled by a bevy of platonic guardians." L. Hand, *The Bill of Rights* 73 (1958).

(59) Bork, *Neutral Principles and Some First Amendment Problems* 47 Ind. L.J. 107 (1971).

(60) Unlike the legislature which can theoretically change its decisions through the proscribed political process, a judicial decision on constitutional grounds is not subject to this same ease of correction. In the short run, societal disagreement with a judicial constitutional determination, no matter how strong, cannot as a practical matter negate a declared constitutional right.

(61) A. Bickel, *The Supreme Court and the Idea of Progress* 94-95 (1970).

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AMERICA'S POST-WAR IMMIGRATION POLICY

By Richard F. Batterson

> In human rights...the tendency to prefer an ethic of motives to an ethic of consequences leads to an overweening concern with the purity of our intentions as embodied in our policies. When the morality of the motive is more important, or viewed as more important, than the consequences, then we become, of course, less concerned about whether or not we have in fact created [a destructive situation]...or contributed to the creation of it, than we are concerned with the morality of our own good intentions.
>
> —Jean J. Kirkpatrick (1)

I. A Historical Perspective

It is doubtful that an American, leaving this country in 1940 and subsequently returning in 1984, would discover much similarity between the county of forty-odd years ago and the present nation. Not only has the geographical face of the land been changed by those minions of Progress, the builder and the bulldozer, but more significantly the composition of the populace has also undergone a remarkable transformation. This latter change has been principly due to dramatic changes in immigration policy which have taken place largely during the post-World War II era.

Between the world wars a small yet vociferous and persistent group of federal legislators advocated sweeping reform of existing immigration law. The views of these men, most prominently represented in the House by Adolph J. Sabath (D-Ill.) and Isaac Siegal (R-N.Y.), would probably have remained those of a relatively important minority had it not been for the events of 1939 to 1945.

The conscious race policies advocated by National Socialists in Germany and the Imperialists in Japan made it relatively easy for many Americans to retreat intellectually from traditional attitudes on immigration predicted upon the virtue of ethnic homogeneity. A second circumstance of the war that contributed to the erosion of long-held convictions regarding the virtue of ethnic homogeneity was the racial composition of the allied armies. Not only did non-white European colonial forces take part in World War II, as did Chinese and Filipino

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troops, but there was also partial integration of races within some American units. A third factor militating against a post-war status quo was the U.S.-Soviet war-time alliance. This helped to undermine the unequivocal position held by pre-war American governments that communism was an ideology inimical to freedom. Moreover, communism was an ideology that purported to embrace "prisoners of starvation," and the "wretched of the earth" – the very people whose cause had been pleaded by U.S. immigration reformers for twenty years. Thus, influenced by the vicissitudes of war and the eventual euphoria of victory, many post-war Americans began to believe that discrimination, whether against American negroes or against immigrants and refugees from allied countries, was unconscionable.

This logic first found expression in the Congress during 1943 when the Chinese Exclusion Acts were repealed. Between that time and 1946, when the Indian Exclusion Act was revoked, a series of bills was introducted demanding an end to all Asian exclusionary laws. The motivating sentiment behind the anti-exclusion position was voiced by Rep. John W. McCormack (D-Mass.). Repeal, he said, was a "denial of the false doctrine of racisim and a reiteration of the American principles of equality of opportunity for life[sic], liberty, and happiness for mankind."(2) The pro-exclusion argument was justified by Senator Rufus C. Holman (R-Ore.), "not on the grounds of inferiority of any race or group but on the ground of incompatibility when in large unassimilable groups they settle permanently among us."(3) Variations on these themes had been voiced by proponents and opponents of the Johnson-Reed Act in 1924, and would again be used during the McCarran-Walter debates. Anti-exclusion agitation culminated in the proposals contained in the Judd bill (1947). Although not enacted into law then, the bill provided quotas for each of the nations of Asia.

President Harry Truman outlined the frames of reference within which post-war American immigration policy would be defined. He did this, significantly, in his controversial civil rights message to Congress in 1948:

> Throughout our history men and women of all colors and creeds, of all races and religions...Millions strong... have helped build this democratic Nation and have constantly reinforced our devotion to the great ideals of liberty and equality.(4)

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Mr. Truman's egalitarian assessment of the past was noteworthy because in it he combined a distorted version of historical fact in an effort to propitiate a nascent negro power bloc,(5) with a blend of liberal idealism which reflected the anti-exclusionary spirit that had flourished within the Democratic Party during the war years.

The ideological bias that supported the President's interpretation of American history prevented him from giving his assent to the first post-war measure aimed at readjustment of the foundations of U.S. immigration policy: the Immigration and Naturalization Act of 1952 (the McCarran-Walter Act).

The act was the result of five years of extensive study by committees in both the House and Senate. The final Senate Judiciary Committee Report amounted to 900 pages. In addition, thousands of pages of testimony – supplied by 400 persons representing local and federal governments as well as private organizations – were published.

The McCarran-Walter Act was considerably more liberal than the law it supplemented. Passed, notwithstanding the President's veto, it removed existing racial and sexual bars to naturalization, and, with the inclusion of the Judd bill, established quotas of 100 for the twenty nations of the Asian-Pacific Triangle. The European quotas (the contentious national-origins provision) were restricted to one-sixth of one percent of the number of American citizens of that particular nationality residing in the United States in 1920.

It was this system of proportional representation based on nationality that most distressed liberal lawmakers. Mr. Truman felt it was not an "adequate policy for the world situation."(6) Senators Herbert H. Lehman (D-N.Y.) and Herbert Humphrey (D-Minn.), co-sponsors of an alternative immigration bill,(7) tarred the McCarran-Walter measure with the epithets "nazi" and "racist." They continued this line of attack in a vain attempt to persuade their fellow legislators that a nefarious group of WASP conspirators were darkly manipulating the levers of power.(8)

Supporters of the President's position unsuccessfully tried to appeal to the emotive question of racial superiority in an effort, both within and without the Congress, to defeat McCarran-Walter. The editorial page of the *New York Times* mirrored the near-hysteria the subject caused in many left-wing journals of

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popular opinion:

> Badly as our country needs revision and codification of our immigration and naturalization laws, it would be better in our opinion to have no revision at all than the kind of racist, restrictionist and reactionary legislation embodied in the McCarran bill....Instead of creating a modern body of immigration law suitable to the middle of the twentieth century, there are clauses of this bill which move many steps backward – in some cases right back into the Dark Ages. (9)

Distilled from inflammatory rhetoric of this kind,(10) the essence of the liberal attitude toward immigration can be found in President Truman's speeches. He dismissed as "absurd and cruel" the "outdated notion"(11) that immigration should bear any resemblance to the ethnic composition of a country. Rather, he inferred that it should be an instrument with which government would be able to realign the racial proportions of a nation to imitate a global configuration. Such a redistributive vision, diametrically different from Mr. Truman's earlier views on the subject,(12) required a far greater infusion of non-European immigrants into the United States than McCarran-Walter provided.

Speaking before the House of Representatives, the President enlisted the aid of the Declaration of Independence ("all men are created equal"), the inscription – from a sonnet by the poetess Emma Lazarus – beneath the Statue of Liberty ("Give me your tired, your poor, your huddled massess") and Saint Paul ("ye are all one in Jesus Christ") in an effort to dissuade its members from passing the McCarran-Walter bill,(13) but his presentation failed. The bill passed overwhelmingly in both House (278-113 in the House, and 57-26 in the Senate).

With an eye to clearing away the haze of sentimentality that opponents of the bill diffused throughout the McCarran-Walter debate, Senator Walter F. George (D -Ga.) pointed to the subtle transformation of priorities that was the basis of the reformist argument:

> a new group of patriots has arisen in this great land. They now lay down a doctrine which, carried to its logical conclusion – and that is where they want to carry it – would mean the abolition of restrictions on immigration....
>
> There is a strange corollary to that doctrine, and that is

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> that somehow people outside this Nation have a right to say what our immigration laws shall be.(14)

In a related vein, one of the bill's sponsors, Senator Pat McCarran (D -Nev.), reminded his colleagues of a seemingly obvious fact, namely that "a solution of the problems of Europe and Asia...will not come as we transplant these problems en masse to the United States of America."(15)

Underlying the debate was a fundamental difference in the world views of the opposing parties. The anti-restrictionists argued that the philosophy of McCarran-Walter, particularly the system of quotas, repudiated their interpretation of ideals inherent in the Nation's democratic institutions. They felt the new immigration act was a re-entrenchment hostile to "a movement towards emphatic reiteration of the moral principle described in the phrase 'equality of mankind'"(16) which was developing contemporaneously in Western nations. By contrast, supporters of the law favored an evolutionary program designed to perpetuate historical immigration patterns and restrict the incursion of those with minimal social, cultural, and ethnic affinity to the traditions that were the foundation of America's established laws and customs. The corner-stone of this policy was the national-origins formula. This provision was defended in the report of the Senate Judiciary Committee:

> the subcommittee believes that the adoption of the national origins formula was a rational and logical method of numerically restricting immigration in such a manner as to best preserve the sociological and cultural balance in the population of the United States....the subcommittee hold that the peoples who had made the greatest contribution to the development of this country [i.e., Western Europeans] were fully justified in determining that the country was no longer a field for colonization, and henceforth further immigration would not only be restricted but directed to admit immigrants considered to be more readily assimilable because of the similarity of their cultural background to those of the principal components of our population.(17)

Initially, Dwight Eisenhower trod a path between the preservationists of the McCarran-Walter camp and the Truman abolitionists. During his campaign for the presidency, the General

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remarked that:

> our laws, and many of our customs, stem from an Anglo-Saxon tradition. But that must not be allowed to overshadow the great contributions that have been made by other nations and other races in the development of our contry.(18)

However, once in office, President Eisenhower's recommendations were not dissimilar from those espoused by liberals earlier in the decade. Although not actually calling for an end to the national origins system, he favored measures that, in effect, undercut the intent of that particular provision. He proposed that "the quota should be based on the 1950 census," rather than on that of 1920; that the resulting additional numbers be redistributed "in proportion to the actual immigration into the United States since...1924 and up to July 1, 1955"; that the numbers of unfilled quotas for one year be pooled (within four geographical areas: Europe, Africa, Asia, and Pacific Oceanic) and allocated on a first-come, first-served basis the following year; that the numbers of special-acts immigrants (such as those entering under the Displaced Persons Act) be counted as part of the non-quota group, and no longer charged to the immigrant's country-of-origin quota; and finally that an unspecified number of orphans be admitted annually for adoption.(19)

Given the bent of President Eisenhower's views on immigration, it is not surprising that during his two terms in office non-European immigrants entered the country at levels not seen since the 1920s. Although the President's recommendations did not become law, the tone of his administrations' position encouraged increased immigration. The sweeping authority granted to the Attorney General under McCarran-Walter, and the loopholes within the Act concerning non-quota entries were the means by which the law was stretched beyond what its framers had intended. Attorneys General Herbert Brownell and William Pierce Rogers waived restrictions that would have prohibited the entry of thousands of otherwise unqualified aliens. Liberal legislators and immigration lawyers quickly breached the non-quota loopholes. During the thirteen years of McCarran-Walter's existence "two out of every three immigrants [were] classed as non-quota and entered without numerical restriction."(20) These factors effectively emascu-

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TABLE 1

Percentages of Legal American Immigrants (51)

	A. Historical (1820-1951)	B. McCarran-Walter (1952-1965)	C. Post-Johnson (1979)	Difference between A & C
Total	39,531,199	3,760,074	460,300	
Europe	33,395,884 (84.5%)	1,710,018 (45.5%)	60,800 (13.2%)	−71.3%
Canada	3,203,326 (8.1%)	595,472 (15.8%)	13,800 (2.9%)	− 5.2%
Americas	1,600,581 (4.0%)	1,148,921 (30.6%)	179,100 (38.9%)	+34.9%
Asia	962,687 (2.4%)	247,837 (6.6%)	189,300 (41.1%)	+38.7%
Africa	34,272 (0.1%)	22,878 (0.6%)	15,000 (3.3%)	+ 3.2%

lated the national-origins principle. The extent of the provision's impotency may be guaged by the number of aliens (approximately 500,000) who entered the country as a result of special exemptions, including "administrative waivers of exclusion, adjustment of status, and suspension of deportation."(21)

The disregard shown by the Eisenhower Administration(22) and by various Congressmen for the national-origins provision, was due in large part to strong immigrant pressure groups. These organizations exerted considerable power among sizeable blocks of voters, and consequently exercised decisive political leverage, especially among members of the House of Representatives. During the post-war period both parties actively courted the immigrant vote through the efforts of the Nationalities Divisions of their respective National Committees.(23) "It is worth noting," one scholar has written, "that the Republican party inserted a plank in its 1956 platform advocating, for the first time, renunciation of restrictionist immigration policies."(24)

The significance of the situation was not lost upon President Kennedy. In an effort to "realize humanitarian objectives,"(25) he proposed abolition of the national-origins system. "In an age of interdependence among nations," he wrote, "such a system is an anachronism, for it discriminates among applicants ...on the basis of birth."(26) As were President Truman and the proponents of the ill-fated Humphrey-Lehman bill, so too was John Kennedy vehemently opposed to immigration laws that accorded – in theory at least – preference to northern and western Europeans. This was the liberal position even though people from those areas of Europe comprised but 20% of the immigrant total between 1890 and 1962.(27) Mr. Kennedy specifically favored increases in the numbers of Asian and West Indian immigrants, and those afflicted with mental disorders.(28)

This philosophy bore fruit in the first year of the Kennedy presidency with the enactment of the Refugee Act of 1961. It was the seventh such act passed into law since 1953, and continued the assault upon McCarran-Walter:

> [the Refugee Act] further diluted the national origins plan by authorizing immediate nonquota immigration for over 18,000 alien relatives....It was the fifth act since 1952 to grant nonquota status to additional orphans....[It] also

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TABLE 2

REFUGEE ADMISSIONS

	Actual Admissions Fiscal 1981	Authorized Admissions Fiscal 1982
Asia	125,000 (81.2%)*	100,000 (71.4%)
Soviet Union . . .	14,300 (9.3%)	20,000 (14.3%)
Eastern Europe .	6,500 (4.2%)	9,000 (6.4%)
Near East	4,000 (2.6%)	5,000 (3.6%)
Africa	2,200 (1.4%)	3,000 (2.1%)
Latin America & Caribbean	2,000 (1.3%)	3,000 (2.1%)

* Note: A spokesman for the Health and Human Services Department, Oliver Cromwell, stated in a *Washington Post* article ("Cutback in Refugee Aid Angers Westerners," [Decemeber 12, 1981], p. 4A) that 132,000 southeast Asians arrived in fiscal 1981.

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> granted quotas to the newly independent Negro nations of the West Indies,...relaxed restrictions against immigration of aliens afflicted with tuberculosis, leprosy, and other dangerous, contagious diseases; [and] extended...waivers of exclusion on hardship grounds.(29)

In 1962, the Kennedy administration made the Fair Share Refugee Law, a temporary measure adopted in 1960, a permanent part of immigration law, and less-contentiously renamed it the Migration and Refugee Assistance Act.

Although this act was a relatively minor part of the Immigration and Naturalization Act, its permanent inclusion set a questionable precedent. The act gave authority to the U.N. High Commissioner for Refugees to determine refugee status. The United States government thus surrendered its delegated power, as representative of a sovereign nation, to define the criteria upon which refugees entering it were to be judged.

The multitude of private immigration bills and the complete disregard for, and evaluation of, the national-origins formulae of the McCarran-Walter Act by politicians with an eye to the proliferating immigrant vote, rendered the 1952 law unworkable. The public pronouncements of the post-war presidents, most notably John Kennedy, perpetuated the sentiments contained in Harry Truman's 1948 speech; giving them a currency, and imbuing them with a force they might not otherwise have possessed.

Revolutionary zeal was abroad during the years of the "New Frontier" and the "Great Society." That fervor helped to shape the programs of the Democratic Party, and, in a modified form, those of their Republican opposition. The spirit of change gave a new lustre to the tenets of centralized state power, and anti-traditional social reform. By the early 1960s this feeling evidenced itself in social and political agitation insisting on a variety of stipulations purporting to redress past injustices and establish new freedoms. Whether in civil rights law or immigration reform, the demand for equality of condition was the most conspicuous ideological peg upon which nympholepts hung legislation. In both fields a new, government-sanctioned discrimination became the order of the day.

It was, therefore, to be expected, given the man, the administration he inherited, and the times, that Lyndon Johnson would institute new policies that were a radical departure from

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traditional law. In as much as this change had already occurred in deed, the Johnsonian statutes merely confirmed the fact in law.

In 1965, during a special message to the Congress in which he quoted Walt Whitman to the effect that America was a "Nation of Nations," President Johnson demanded the elimination of national quotas.(30) With bipartisan support in both Houses, the President, who as a Southern Senator thirteen years before, had voted *for* McCarran-Walter and *against* Mr. Truman, succeeded in ending 145 years of continuity in immigration law. He achieved this feat (the new immigration bill passed easily in both chambers: 320-69 in the House and 76-18 in the Senate), with an act that was cleared after only "twenty-nine days of hearings and the testimony of 56 witnesses."(31) Clearly, the philosophy that immigration should be "a mirror held up before the nation, reflecting the peoples who composed it,"(32) had expired. The politically-astute Texan sensed the monumental social transformation that was being engineered within the United States, and took advantage of it. Mr. Johnson described his accomplishment as the repairing of "a very deep and painful flaw in the fabric of American justice."(33)

Historian J.J. Huthmacher's observation about Robert Wagner, i.e., that his "frequent denunciations of...the 'unjust and bigoted' Immigration Quota Law of 1924 identified Wagner as a Northern Democrat appealing to a big-city immigrant-derived constituency,"(34) was applicable, writ large, to President Johnson. He was appealing to all of the non-Northwestern European immigrant communities of the nation. He was courting the recently-politicized urban negroes; the liberal/left students and their intellectual mentors on the campuses of the country; and those middle- and upper-class individuals who suffered anguish because of the chasm between liberal utopia and reality.

One of the prime movers behind the new immigration legislation was Senator Edward Kennedy (D -Mass.). He attributed the ease with which the bill passed to the large liberal Democratic majority (292-140 in the House, and 68-32 in the Senate) in Congress; to the fact that the balance of power on the Judiciary Committees was also in the hands of politicians favoring liberal-oriented change; and thirdly, to the dedication within the Executive Branch – under both Presidents Kennedy and John-

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son – to abolish all legislation that might conceivably be labelled as supporting any hint of discrimination against non-whites. The abolitionist viewpoint, asserted Senator Kennedy, was "consonant with the changing attitudes among our citizens on questions of race and national origin."(35)

Unquestionably, these factors contributed to the passage of the bill. Senator Kennedy failed, however, to elaborate on the behind-the-scenes maneuvering that assured the outcome. In fact, the administration exerted continuous and considerable pressure on Michael Feighan (D -Ohio), chairman of the House Judiciary Immigration and Nationality Subcommittee, and a representative of a district with a sizeable immigrant constituency. The membership of Congressman Feighan's subcommittee, at the behest of the President, was enlarged from five to nine. All four additional members were sympathetic to the Johnson bill, thus assuring its approval and restricting effective dissent. Furthermore, through the chairman of the Full Judiciary Committee, Emanuel Celler (D -N.Y.), the administration thwarted Congressman Feighan's attempt to reactivate the Joint Committee on Immigration and National Policy, a body mandated to investigate all immigration proposals thoroughly.(36) Because of the intransigence of the bill's proponents, this far-reaching legislation was passed through both houses after less than a month devoted to hearings.

The movement within Congress received unqualified support from the nation's press. Popular periodicals such as *Life, Scientific America, The New Republic,* and *Time* featured articles and editorials enthusiastically supporting the President's iniative.(37) A sophisticated advertising campaign managed by the *ad hoc* National Committee for Immigration Reform promoted the idea that the bill was beyond censure. Characteristic of the quasi-religious aura that enveloped the abolitionist movement was a full-page advertisement in the *Washington Post* that featured photographs of the four post-war presidents, and the names of 285 prominent men and women who supported elimination of the national-origins system.(38)

Taking exception to the new immigration law, Professor Ernest van den Haag wrote:

> The wish to preserve one's identity and the identity of one's nation requires no justification – and no belief in superiority – any more than the wish to have one's own

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> children, and to continue one's family through them need be justified or rationalized by a belief that they are superior to the children of others,...One identifies with one's family, because it is one's family – not because they are better people than other's. For no other reason one identifies with one's national group than with others. Else there would be no nations. (39)

The preservation of a historic national identity was a concept foreign to the prevailing bias in the Congress. Those who had set out to destroy the national-origins procedure had disassociated group from state by enlarging the definition of "American" to such an extent, and with such rapidity, as to make it meaningless. An irony surely lost on the abolitionists in years to come was the clamoring by diverse ethnic and racial groups for their "right" to their own distinctive identities.

The intention, although abused, of the McCarran-Walter Act had been to perpetuate the social, cultural, and ethnic unity of the nation by means of a system of proportional quotas. The new act of 1965 discarded this goal in favor of a plan based upon the dubious principle of first-come, first-served. (40)

The major provisions of the new act were the imposition of a ceiling of 120,000 on Western Hemisphere countries; the establishment of a ceiling of 20,000 on Eastern Hemisphere nations that had previously been allotted quotas corresponding to their representation in the 1920 census (exempt from both of these limits were the parents, spouses, and children of U.S. citizens); the abolition of the national-origins system of quotas; and abandonment of the concept of the Asia-Pacific triangle.

Opposition within Congress was discounted because objections were anticipatory. Senator Kennedy summed up the majority opinion:

> Arguments against the bill were chiefly based upon unsubstantiated fears that the bill would greatly increase annual immigration, would contribute to increased unemployment and relief rolls, would ease the bar to the entry of security risks, and would permit the excessive entry of persons from Africa and Asia. (41)

Fears of a future distinguished by uncontrolable immigration from the Americas and the Caribbean because of endemically poor economic conditions, and a birth rate that rises exponentially, were dismissed by pro-immigration proponents. To these

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charges, Senator Kennedy replied: "Administration leaders, and those who supported them in Congress, recognized this possibility, but did not believe such developments were imminent."(42)

Lyndon Johnson declared that the new laws *were not* revolutionary. However, his protestations, like those of the Queen in the play within *Hamlet,* were suspect. The effects of the amendments to the Immigration and Nationality Act were without precedent, and they established a base upon which additional radical liberalization was to be made. In attempting to fell "the twin barriers of prejudice and privilege," Mr. Johnson instituted a system that was not – as he said – a "return to the finest of the Nation's traditions."(43) The new laws ignored tradition and excluded prospective new-comers from those nations that had from 1820 to 1965, provided 81.1% of America's immigrant population.(44)

Richard Nixon was not particularly concerned with immigration reform, although he did submit legislation designed "to enlarge upon our national tradition as an open nation and an open society."(45) His public statements preserved the popular belief that America's strength as a nation lay in her ethnic diversity. The President characterized this as "Heinz, 57 varieties,"(46) which was a reduction in the numbers of contributors that his more liberal colleagues were wont to cite.

In 1980, during the Carter presidency, the framework of the Refugee Act was expanded to "introduce a more universal and humanitarian definition of 'refugee.'"(47) This definition allied American law more closely with the body of international legislation that is typified by the United Nations' Universal Declaration of Human Rights, notably Article 14,1: "Everyone has the right to seek and to enjoy in other countries asylum from persecution"; and Article 15,2: "No one shall be arbitrarily...denied the right to change his nationality." Mr. Carter also trebled the yearly refugee quota, and increased to 320,000 the annual number of both immigrants and refugees allowed entry. Among other provisions, the amending bill gave the President the prerogative to enlarge the refugee quota if he and Congress felt such action was warranted. The bill also provided for the creation of two new bureaucracies to deal with the multiplying numbers of refugees: the office of the U.S. Coordinators for Refugee Affairs; and, within the Department of

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Health and Human Services, the Office of Refugee Resettlement. A third point of interest was the allocation of "$200 million annually for supportive services, including English language and other training and social employment services" in aid of refugees.(48)

President Reagan's most remarkable effort in immigration reform has been his approval of a proposal, passed easily in 1982 by a Republican-dominated Senate but stopped in the House of Representatives, to grant amnesty to unknown millions of illegal aliens. This legislation, which is two separate but similar bills (Simpson's in the Senate, and Rodino-Mazzoli's in the House), was again put forth in 1983, but failed to become law.

The bill, entitled the Immigration Reform and Control Act, would amend current law to make it unlawful for employers to hire illegal aliens; would allow for an increase in the budget and size of the Immigration and Naturalization Service; would increase the ceiling for colonial immigrants from 600 to 3,000 per annum; would double the yearly immigrant limits for both Canada and Mexico to 40,000; would grant permanent resident status to illegal aliens "who have continuously resided in the U.S. since before January 1, 1982"; and would allow illegal immigrants who have lived in the United States since January 1, 1973 the opportunity to become permanent residents.(49)

Mr. Reagan's administration has also instituted a program which will bestow citizenship upon the illegitimate "Amerasian" children of American servicemen stationed in Korea, Viet Nam, Laos, Cambodia, Thailand, the Philippines, and Japan retroactively to 1950. Their numbers are not known, but conservative estimates begin at 170,000; a figure that includes neither the spouses nor the progeny of these people.(50)

The history of immigration and refugee policy since World War II has been one of immoderate change brought on by an ideological vision in which the population of the United States mirrors that of the world. Reform has brought America's immigration law in line with the precepts outlined thirty-five years ago by President Truman. Third World immigrants, specifically from the countries of Asia and the Americas, have beneftied greatly from the new laws. The racial composition of those being allowed to come to America has shifted drastically

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from Caucasians of Europe and Canada, to Orientals, Mestizos, and negroes from the underveloped areas of the world. The magnitude of the transformation is illustrated in Table 1.

II. The Present Situation

Immigration to the United States today resembles a Gandhi-esque, non-violent invasion. A situation predicted by the late ruler of Algeria, Haouri Boumedienne:

> No quantity of atomic bombs could stem the tide of billions...who will someday leave the poor southern part of the world to erupt into the relatively accessible spaces of the rich northern hemisphere looking for survival.(52)

During the past thirty-five successive governments have worked from the premise that the United States has a moral duty to mirror the ethnic conformation of the world's population, and to provide an economic haven for the destitute and the oppressed of the Third World. Only recently have the scope and the magnitude of the problems resulting from unrestricted and undifferentiated immigration begun to be realized. Former proponents of open, non-European, immigration are now cautious or even pessimistic about the future of the "new" America. In his recently-published *America In Search Of Itself,* Theodore White lauded Lyndon Johnson's 1965 Immigration Act as "noble" and "revolutionary," designed to "wipe out statutory discrimination."(53) Yet, he considered that the legislation was "probably the most thoughtless of the many acts of the Great Society."(54) And, in a reflective mood, White soberly admitted that the Kennedy-Johnson laws may well have been implements of national destruction:

> what could become a catastrophe – the tide of immigration, legal and illegal, pouring into this country.
>
> For this underswell, neither the census nor any other authority can provide fully reliable measurement. One starts with the obvious: that the United States has lost one of the cardinal attributes of sovereignty – it no longer controls its own borders. Its immigration laws are flouted by aliens and citizens alike, as no system of laws has been flouted since Prohibition.(55)

It is improbable, regardless of the Reagan Administration's rhetoric, that the Reform and Control Act would have checked the tide. Unless human nature is of a unique kind south of the

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Rio Grande, it seems likely that such forgiveness will be interpreted by those Central American and Caribbean countries discharging their excess populations into the United States as indicative of weakness and a lack of will to resist further (and probably greater) illegal ingression. This absence of resolve in defending the nation, from what is clearly a conquest of much of the southwest, can only give the by-no-means-inconsiderable numbers of active Chicano nationalists a renewed sense of purpose.

The mission of retaking the mythical northern kingdom of the Aztecs, Aztlan, has been unequivocally endorsed by Chicano writers. Armando Rendon has written:

> The concept of Aztlan is undergirded by a desire for restitution of the land of Aztlan....Just as for other displaced peoples in the world's history, the cry of the land is keen in our ears; we, too, have had title to land which was violently taken from us.(56)

The *reconquista,* and the call for a separate and independent homeland, may not be merely the vaporings of malcontents feeding upon America's appetite for guilt and self-abuse. The idea that the American government might even cede a portion of its southwestern territory to militants posturing under fabricated grievances seems beyond the realm of the possible. Yet anyone who had suggested in 1960 that in twenty years' time millions of illegal Mexican aliens would be residing within the United States, and furthermore that they would be courted by politicians, would also have met with derision. The fact is that such talk gives muscle to Chicano political activists.

Thus. most Chicano activists show little sign of accomodating themselves to an American identity,(57) but prefer instead to perceive of themselves as conquerors. Simultaneously, they also take advantage of antiquated laws enacted for citizens and legal residents. Their philosophy has been outlined in the *Chicano Manifesto*:

> A new relationship should develop between Mexican American people and the federal government, one in which the Chicano would be given the status not only of an American citizen but...with special rights of language, culture, and responsibility....Then we could more readily embrace Chicanismo and absorb or reject whatever aspects of Anglo society we wished.(58)

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Frequently criticizing the host nation, its culture, and its citizens of European descent ["Anglo-American society is a bastard issued from the promiscuous concubinage of several hundreds of ethnic and racial peoples..."],(59) militant Chicano immigrants imagine themselves to be the people of the moment, and of the future:

> We are a modern people. While the *nonraza* nations are dying or dead as cultural entities, the mestizo people, *la raza,* are but a few hundred years old...[and] number some 200 to 250 million people in the Western Hemisphere today. By the year 2000, we will be twice as many as the Anglo-American.(60)

Such views and goals may or may not be realized, but at best tend towards the ethnic Balkanization of the U. S. a condition Keven Phillips sees occurring presently as a result of "the failure of...leadership elites to understand the simple facts of race, ethnicity, territory, greed and inequality."(61) Chicano claims and politicians' concern for Chicano votes are endowing the massive numbers of illegal immigrants in the U.S. with political power which an increasing proportion of commentators perceive as inimical to the interests of the legally-resident population.

Former Mexican President Lopez Portillo expressed benign sympathy for those of his countrymen who illegally emigrate to the United States. The ruler of a country whose economy is in severe difficulties, and whose population has increased threefold since 1945 (and will double again by the year 2000),(62) succinctly stated his country's view of the diaspora: "it is not a crime to look for work and I refuse to consider it as such."(63) His successor, Miguel de la Madrid, seems to cloak the problems in the same euphemistic fashion:

In December 1982, the Mexican Senate unanimously passed a resolution condemning American efforts to stem the illegal tide. The senators stated that:

> This transcendent matter should not be considered from a unilateral perspective, but rather should be treated from a bilateral and even multilateral perspective, taking into account the far-reaching migratory phenomenon of undocumented persons between our two countries.(64)

One can infer from the tone of the resolution that a future resolution of the problem may involve an appeal to a multi-

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national tribunal. This was the course Presidents Kennedy and Carter tentatively trod when they aligned American refugee law with that of the United Nations, and by implication, surrendered a portion of America's sovereign decision-making process to that international body.

During the 1970s there was a 61% increase in the number of Mexican nationals in the United States.(65) This can be attributed to the disinclination of Mexican leaders to stop their poor and unemployed from emigrating *en masse*; the absence of any steadfast action by consecutive American governments to unequivocally and effectively deal with the mounting demands of racial and ethnic minorities; the potential political power perceived as accruing to the growing illegal immigrant communities; and the possibility – looming in the future – of third-party intervention.

Presently, there are forty congressional districts in eight states in which Mexicans constitute more than 20% of the residents.(66) In some of these districts illegal aliens make up half of the population.(67) There are Mexican communities of considerable size in most large urban areas. They form the voting majority in San Antonio, where Mayor Henry Cisneros recently described Hispanics as living along a new socio-geographical frontier, a "third coast from Los Angeles to Houston to Miami."(68) In Los Angeles their numbers have increased 200% since 1971, making that city the second largest center of Mexican population in the world.(69) The millions of Mexicans now residing in America have led one scholar to conclude that politically the "burgeoning Hispanic influence is likely to be a hallmark of the next decade."(70)

In as much as the Democrats control 82% of the districts in which Mexicans are more than 20% of the population,(71) it seems likely that Mr. Reagan's amnesty program may not have been prompted solely by humanitarian considerations. By courting the potentially large "illegal-alien" vote of the future,(72) the President is bowing to the exigencies of the political present; and aggravating a minatory situation that carries with it the seeds of societal fragmentation.

Not all elected political representatives have been either mute or acquisescent, as the European character of the Untied States has been disparaged and transformed. Senators Huddle-

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stone, East, and Simpson have voiced persistent, if cautious, reservations about unrestricted immigration. Alan Simpson (R -Wyo), Chairman of the Sentate Subcommittee on Immigration and Refugee Policy, suggested that:

> if immigration is continued at a high level, but a substantial portion of these new persons and their descendants do not assimilate into the society, they may well create in America some of the same social, political, and economic problems which exist in the countries from which they have chosen to depart.
>
> And if language and cultural separatism rise above a certain level, the unity and political stability of the nation will – in time – be seriously eroded.(73)

Senator Simpson's diplomatically-expressed warning is brought clearly into focus when one realizes that the United States accepts "twice as many foreigners as all other nations combined."(74) This extraordinary fact gives cause for reflection in as much as 83.3% of the legal, and all of the illegal newcomers are of non-European origin – a fact which could retard their assimilation and heighten ethnic tensions. The numbers of illegal immigrants are escalating dramatically. In a single month, April, 1983, 104,547 Mexican aliens were arrested by immigration officers. This is an increase of 48% above the number apprehended the previous year during the same month.(75) Perhaps more important than the increasing numbers, is the changing kind of illegal immigrant. In the past, young men seeking employment constituted the majority of illegals. Now entire "families are sneaking across, apparently to stay for good."(76) The prospect of amnesty has been cited by Border Patrol officials as a factor contributing to the marked increase in illegal entry. The proposals of the Reform and Control Act have been widely publicized in Mexico.(77)

Today most immigrants, legal and illegal, come from Mexico, the Carribean and the Americas, although a significant and increasing number come from India, Pakistan, Bangla Desh and Africa (especially Abyssinia) with a number of illegal immigrants continuing to enter from the Far East. Under the presidency of Jimmy Carter the overwhelming majority of refugees who were allowed to enter the United States legally were people fleeing from the tyranny of communist regimes in southeast Asia (see Table 2).

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Asians have tended to gravitate to large West Coast metropolitan areas. Although they presently account for but 1.5% of the entire United States population, in San Jose, Seattle, Los Angeles, and San Diego their numbers have grown to approximately 7% of the whole; while in San Francisco 21.7% of the inhabitants are oriental.(79) The Asian influx into Los Angeles and Orange County is indicative of what is happening in many areas of America:

> Too few to count in 1970, Vietnamese in and around Los Angeles numbered 29,000 by the 1980 census. At least one person in the state financial and demographics research department thinks the number has doubled since then. In neighbouring Orange county...estimates of the number of Vietnamese range between 40,000 and 60,000.(80)

As much a cause for concern as the number of aliens, are the foreign cultures brought by new arrivals. The impact on Miami by newly-landed Cubans (200,000 between June, 1980 and December, 1981) and Haitians illustrates a situation faced by scores of American cities and towns:

> The Hispanics are moving in, and the Anglos are leaving, moving north to Broward County and to the center of the state with its fairyland patina. They are leaving a Miami where others dance to salsa rhythms or hold goombay festivals, and where cemetery workers each morning remove dead chickens, heads of goats, and voodoo dolls from the graves and fences.
>
> It is believed that members of a voodoo sect called Santeria (with African origins by way of Cuba) are responsible for the necromantic litter [which has been a daily problem for the past seven years].(18)

Viewed from the slopes of Capital Hill, or from a sanctuary on Martha's Vineyard or Bar Harbor, those colorful activities may seem an interesting facet of a multi-hued American mosaic, but to the established American residents of Miami this new exotica is often regarded as threatening. Across the continent, in "America's uneasy new melting pot,"(82) Los Angeles, the scenario is repeated:

> Los Angeles had, in effect, ceased to be a community of European culture, although no one could guess what would emerge from a city that now clustered Hindus and blacks, Koreans and Japanese, Mexicans and Filipinos,

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> Vietnamese and Israelis. The city was still held together by the old culture expressed in its two dominant newspapers (the *Times* and the *Herald-Examiner*), the common law descended from England, the laws of the United States, and the roads of American engineering. A new Athens might emerge – or a new Calcutta. (83)

Responses to the problems posed by open immigration by men of letters show that a journalistic or academic perception of the situation, like a political one, is likely to reflect a pro-immigration ideal or bias. Former staff director of the Select Committee on Population, Michael Teitelbaum, praises the "invigoration and pluralism" the immigrants provide. He is not loathe to chide the nation, presumably those who favor restricted immigration, for not having "fully lived up to the poem inscribed on the Statue of Liberty, but," he maintains, "the concept of a melting pot of many national origins...is still an American ideal."(84)

That ideal followed to its ultimate conclusion, a course the nation's recent presidents seem – perhaps inavertently – to have pursued, leads to a set of circumstances posited by Professor Judith Lichtenberg in which national borders are superfluous:

> National boundaries are increasingly less relevant,...This may be as much a function of the immensity of the modern nation-state as it is of the increasing interrelations among nations, where relations among fellow citizens are in many cases more remote than those between some citizens and some extranationals. (85)

The writer, when attempting to answer the question of what a "legitimate and reasonable immigration policy" might be, poses two alternatives. These are based upon, for her and for the majority of liberals, exclusive relationships: one "historical" [American policy until 1965],(86), the other, "moral" [post-McCarran-Walter policy]. If the "moral" route is to be followed, the nation "should certainly be committed to enlarging immigration quotas."(87) Dr. Lichtenberg admits that although unlimited immigration in her view, is a moral good, some of her fellow citizens [a majority according to recent pools] (88) might consider such altruism destructive. This obstruction is breached and her objective is reached by means of what might be termed "the stretch method":

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> Ordinary people cannot ordinarily be required to reduce themselves to subsistence; more generally there are limits on what can reasonably be demanded of people. But again, what these limits are is variable, and depend in part on what normally *is* demanded or expected. So it is likely that by stretching the limits we make it possible to stretch them further. And the conventional element in harms and other declines in welfare serves to reduce the cost when obligations are collectively assumed.(89)

Careful reading of Dr. Lichtenberg's observations show them to be a precis of the methods employed by Presidents Truman, Kennedy, Johnson, Carter, and Reagan in opening America's borders to the exploding population of the Third World.

Another who views the Third World *revanche* with equanimity is the syndicated columnist, George Will. He has lauded the new immigrants as a vigorous infusion:

> Individuals with the grit and families with the cohesion to make their way here from Indochina and Cuba are going to be, many of them, overachievers, leavening and invigorating America. Before long there will be, if there are not already, a lot of high-school valedictorians named Nguyen and Lopez.
>
> ...the newest citizens have the clearest idea of what we're celebrating when we raise a red-white-and-blue ruckus on the Fourth of July. So this year, light a sparkler for all the Nguyens and Lopezes.(90)

There are still those, however, who would question Mr. Will's views from the point of view of sociological realism. The immigrants who achieved American independence were people with an essentially common social, cultural, racial, and religious background. Within the framework of English law they were able to overcome individual and group differences and maintain their sovereignty. By contrast, immigrants of the past fifteen years have few common cultural denominators either among themselves or with their hosts. It is true the Mexicans, the Filipinos, the Haitians, and some of the Indochinese are nominally Catholic, but even this factor is modified by diverse patterns of religious belief and practice. In as much as the Catholic Church has been a medium for what is euphemistically called "liberation theology," it seems unlikely that religion will be a unifying force. The immigrants do possess a tenuous cohesion

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by virtue of the fact that they are non-European in origin. This may give some of them a feeling of unity vis-a-vis the white majority segment of the U.S. population, but this at best, is a brittle bond, and moreover, is one which will not enhance their potential for assimilation – if, indeed, that is the desired goal. Mr. Will does not take the view that massive unassimilable infusions of peoples have historically marked the demise of a society.

This latter historical view is also skirted by Wattenberg, who observes that "we are well on our way to becoming the first truly universalist nation."(91) After examining the astonishing increases in legal Third World immigration since the enactment of the Johnson law (Philippines, 1,542%; India, 7,050%; Korea, 3,833%; Viet Nam, 4,300%; Cuba, 281%; Ecuador, 340%; Haiti, 1,150%; Mexico, 94%; and China and Hong Kong, 689%), Professor Wattenberg concludes that these masses will be beneficial because they will provide growth for the country; he intimates that populous countries are both powerful and influential; he believes the newcomers will be industrious and will, as a consequence, create employment and wealth; he thinks the magna-cultural incursion will benefit the United States by providing closer ties with the backward countries from which the immigrants come; and, finally, the Senior Fellow of the American Enterprise Institute sees these people as staunchly anti-communist.(92) Whether or not these presumptions will come to pass is, in fact, an exercise in environmentalist sociology.

It may be optimistic and humanitarian to envision a populous polyglot nation as rich, prosperous, contented, powerful, and influential; yet, the two foremost examples of such nations today, India and Brazil, are neither prosperous nor contented, and hardly powerful and influential. Indeed, both are beset by social and ethnic problems that strain the bounds of law, order and economic well-being. Nevertheless, Professor Wattenberg, concludes that:

> The arrival of immigrants to this nation in these last two centuries has been one of the wondrous stories of humankind. It will probably work out fine as we change from a folk that comes from many places to a folk that comes from most places. But we don't really know that. It's never been tried before.(93)

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The presence of large numbers of people unable and unwilling to be absorbed into previously European or European-dominated countries presents a singularly refractory problem for modern social commentators. The prominent British Social Democratic politician, David Owen, lays bare the thorny predicament of liberal intentions and consequences when he concludes that immigrants pose "a particularly difficult and intractable problem called 'race'."(94) Having exposed the source of the disruption that indiscriminate immigration causes, Dr. Owen then – true to his ideological convictions – courageously declares that "Race" is merely a "crude euphemism." He then restates the less jarring vision to which liberals have dogmatically clung during the past four decades:

> Immigration should be viewed, together with natural increase, death and emigration, as only one of several factors affecting the structure of our population. It is on fears and uncertainties that racialism feeds, and vague emotive phrases and meaningless statistics feed those fears.(95)

Yet, even Dr. Owen feels obliged to admit that possibly the chimera of equality and its enforced application in matters of immigration might not be the panacea that socialist and liberal optimists have envisioned it to be: "it is an issue where our theoretical liberalism of the 1950s and 1960s is being tested against the harsh and fundamentally different reality of the late 1970s."(96) It is this conflict between theory and reality that is the focus around which the immigrant problem revolves.

FOOTNOTES

(1) "Why Not Abolish Ignorance?" *National Review,* vol. XXXIV, no. 13 (July 9, 1983), p. 830.

(2) *Congressional Record-House,* vol. 89, part 6 (October 20, 1943), p. 8579.

(3) *Congressional Record-Senate,* vol. 89, part 8 (November 26, 1943), p. 9989.

(4) *Harry S. Truman* [Public Papers of the Presidents of the United States], January 1 To December 31, 1948 (Washington, D.C.: U.S. Government Printing Office, 1964), p. 121.

(5) It should be remembered that the power of negroes within the Democratic Party was strong enough in 1944 to prevent the vice-presidential nomination of James Byrnes of South Carolina. (See: Nathaniel Weyl, William Marina, *American Statesmen on Slavery and the Negro* [New Rochell, New York: Arlington House, 1971], p. 358.)

(6) *Truman,* January 1, 1952 To January 30, 1953, p. 441.

(7) The three main provisions of the Humphrey-Lehman bill were: immediate

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eligibility for immigration granted to approximately 600,000 Asians living in non-quota Western Hemisphere countries; removal of the national-origins quota system; and a substantial increase in the number of non-oriental aliens eligible for admission (*Congressional-Senate,* vol. 98, part 5 [May 21, 1952], p. 5623). The tactic to win Asian support for the Humphrey-Lehman measure failed. The four major national organizations representating 90% of American orientals supported the McCarran-Walter bill (Ibid., p. 5624).

(8) *Congressional Record-Senate,* vol. 98, part 4 [May 11, 1952), pp. 5101-2.

(9) "A Veto Deserved," *New York Times* (May 24, 1952), p. 18. Those magazines siding with the *Times* in an openly anti-McCarran-Walter position were *Commonweal,* vol. LVI, no. 8 (May 30, 1952), pp. 187-8; *Life,* vol. 32, no. 10 (March 10, 1952), p. 30; *The Nation,* vol. 174, no. 25 (June 21, 1952), p. 595; *New Republic,* vol. 126, no. 21 (May 26, 1952), p. 5; and *Time,* vol. LIX, no. 22 (June 2, 1952), p. 16; and vol. LX, no. 17 (October 27, 1952), pp. 77-8. *U.S. News & World Report* published two unbiased articles about the immigration controversy: vol. XXXII, no. 24 (June 13, 1952), pp. 76-7; and vol. XXXIII, no. 18 (October 31, 1952), p. 26. The *Saturday Evening Post,* vol. 225 (February 21, 1953), p. 10, contributed an article favorable to the McCarran-Walter bill.

(10) Mr. Truman was not above playing upon the fears of various groups within the electorate. During his campaign for re-election, after the passage of McCarran-Walter, he attempted to exploit Jewish fears of racial discrimination. In a speech he wrote that was presented to the Jewish Welfare Board, he said that national-origins quotas were "based on 'nordic' superiority (*New York Times* [October 18, 1952], p. 14)."

(11) *Truman,* January 1, 1952 To January 30, 1953, pp. 442, 443.

(12) It is interesting to note that in the 1920s, before "minority rights" became political coin-of-the-realm, Mr. Truman's opinions about a multi-racial nation were decidedly different. In a letter of that period, recently made available to scholars, the future president wrote: "Yellow men should be in Asia, white men in Europe and America, and black men in Africa (reported on the *Paul Harvey* radio program, April 11, 1983)."

(13) *Truman,* January 1, 1952 To January 30, 1953, p. 443.

(14) *Congressional Record-Senate,* vol. 98, part 5 (May 22, 1952), p. 5773.

(15) Ibid., vol. 98, part 4 (May 16, 1952), p. 5330.

(16) Richard Plender, *International Migration Law* (Leiden: A.W. Sijthoff, 1972), p. 65.

(17) U.S. Congress, Senate, Committee on the Judiciary, *The Immigration and Naturalization Systems of the United States,* 81st Congress, 2nd. Session (1950), Senate Report 1515, p. 455.

(18) *New York Times* (October 18, 1952), p. 8.

(19) *Dwight D. Eisenhower* [Public Papers of the Presidents of the United States], January 1 To December 31, 1957 (Washington, D.C.: U.S. Government Printing Office, 1958), pp. 113-4.

(20) Marion T. Bennett, "The Immigration and Nationality (McCarran-Walter) Act of 1952, as Amended to 1965," *The Annals of the American Academy of Political and Social Science,* vol. 367 (September, 1966), p. 134.

(21) Ibid., John Kennedy, in a book he wrote with the assistance of the Anti-Defamation League of the B'nai B'rith, remarked that "in the 87th Congress over 3,500 [private immigration] bills were introduced. [Such]...bills make up about half of our legislation today (*A Nation of Immigrants* [New York: Harper & Row, 1964], p. 79)."

(22) A foreshadowing of the administration's attitude was revealed during a preliminary Senate vote on McCarran-Walter. As the anti-McCarran *New York Times* observed: "it is gratifying to note that in one important test before final passage of the McCarran bill the names of eight Republicans recorded on the liberal side of this

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issue read almost like a roster of the principal Eisenhower spokesmen in the Senate (May 24, 1952, p. 18)."

(23) Lewis L. Gerson, *The Hyphenate in Recent American Politics and Diplomacy* (Lawrence, Kansas: University of Kansas Press, 1964), chapter II.

(24) Ibid.

(25) *John F. Kennedy* [Public Papers of the Presidents of the United States], January 1 To November 22, 1963 (Washington, D.C.: U.S. Government Printing Office, 1964), p. 597.

(26) Ibid., p. 595.

(27) Mr. Kennedy, and liberals in general, while deploring immigration laws that favored aliens from northern and western Europe, failed to point out that the large northwestern quotas had not been filled for years; while the smaller allotments for the nations of the rest of Europe were consistently filled. Between 1890 and 1962, 21,505,898 immigrants came from Europe; of that 5,505,038, or 26% came from northern and western countries. (From tables in *Historical Statistics of the United States, Colonial Times to 1970,* House Document No. 93-78, Part I [Washington, D.C.: U.S. Government Printing Office, 1975], Series C 89-119, pp. 105-6.)

(28) *Kennedy,* pp. 596-597.

(29) Bennett, pp. 135-6.

(30) *Lyndon B. Johnson* [Public Papers of the Presidents of the United States], January 1 to May 31, 1965 (Washington, D.C.: U.S. Government Printing Office, 1966), Book I, p. 37.

(31) Senate Report 748, 89th Congress, 1st Session (September 15, 1965), p. 11. [Cited in Bennett, p. 128.]

(32) Senate Report 1515, 81st Congfess, 2nd Session (1950), pp. 442-5. [Cited in Bennett, p. 129.]

(33) *Johnson,* June 1 To December 31, 1965, Book II, p. 1038.

(34) J. Joseph Huthmacher, *Senator Robert F. Wagner and the Rise of Urban Liberalism* (New York: Atheneum, 1968), pp. 51-2.

(35) Edward M. Kennedy, "The Immigration Act of 1965," *The Annals of the American Academy of Political and Social Science,* vol. 367 (September, 1966), p. 149.

(36) *Congressional Quarterly,* vol. XXIII, no. 41 (October 8, 1965), pp. 2039-44.

(37) See: *Life,* vol. 58, no. 10 (March 12, 1965), p. 4; *Scientific America,* vol. 213, no. 5 (November, 1965), p. 48; *New Republic,* vol. 152, no. 9 (February 27, 1965), pp. 15-16; and *Time,* vol. 86, no. 7 (August 13, 1965), p. 17A; and vol. 86, no. 14 (October 1, 1965), pp. 27-8. *Commonweal,* vol. LXXXII, no. 11 (June 4, 1965), pp. 340-1, did not believe the new immigration bill was a radical enough departure from tradition. Two unbiased reports on immigration were published by *U.S. New & World Report*: vol. LIX, no. 10 (September 6, 1965), p. 8; and vol. LIX, no. 15 (October 11, 1965), pp. 55-7.

(38) *Washington Post* (August 24, 1965), p. A15.

(39) Ernest van den Haag, "More Immigration," *National Review,* vol. XVII, no. 38 (September 21, 1965), p. 821.

(40) The national-origin scheme ceased operation on July 1, 1968. Between October, 1965 and that date, the unused visas (mainly from northwestern Europe) were given to those countries with long waiting lists (predominantly southeastern Europe, and the Philippines).

(41) Edward M. Kennedy, p. 145.

(42) Ibid., p. 146.

(43) *Johnson,* Book II, p. 1039.

(44) Total immigration, 1820 to 1965: 43,291,273; European immigration: 35,105,902, or 81.1%. (Calculated from tables in *Historical Statistics,* pp. 105-6.)

(45) *Richard Nixon* [Public Papers of the Presidents of the United States], 1971

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(Washington, D.C.: U.S. Government Printing Office, 1972), p. 72.

(46) Ibid., 1970, p. 764.

(47) Edwin B. Silverman, "Indochina Legacy: The Refugee Act of 1980," *Publius,* vol. 10, no. 1 (Winter, 1980), p. 27.

(48) "Bill Cleared to Triple Refugee Admissions," *Congressional Quarterly Almanac,* vol. XXXVI (1980), p. 378.

(49) *Congressional Record-Senate,* vol. 129, no. 68 (May 18, 1983), pp. S6970-S6986; *Congressional Record-Extensions of Remarks,* vol. 129, no. 69 (May 19, 1983), pp. E2427-8.

(50) William Drozdiak, "Strangers In Their Own Lands," *Time* [International edition], (December 14, 1981). (Quoted in *Congressional Record-Extensions of Remarks,* vol. 128, no. 17 [March 1, 1982], pp. E611-12.) The Immigration Reform and Control Act deals with this subject under the heading "putative fathers." The Act "recognizes, for preference petitioning purposes, the relationship between a biological father and his illegitimate child."

(51) Percentages in columns A and B were calculated from the tables in *Historical Statistics,* pp. 105-9. Those in column C were derived from the table in *Statistical Abstract of the United States: 1981* (Washington, D.C.: U.S. Government Printing Office, 1981), p. 88.

(52) Quoted in Michael S. Teitelbaum, "Right Versus Right: Immigration and Refugee Policy in the United States," *Foreign Affairs,* vol. 59, no. 1 (Fall, 1980), pp. 45-6.

(53) Theodore H. White, *America In Search Of Itself* (New York: Harper & Row, 1982), p. 363.

(54) Ibid.

(55) Ibid., p. 361.

(56) Armando B. Rendon, *Chicano Manifesto* (New York: Macmillan, 1971), p. 309.

(57) James W. Lamare, "The Political Integration of Mexican American Children: A Generational Analysis," *International Migration Review,* vol. 16, no. 1 (Spring, 1982), pp. 169-74.

(58) Rendon, p. 85.

(59) Ibid., p. 16.

(60) Ibid., pp. 280-1.

(61) Kevin Phillips, *Post-Conservative America* (New York: Random House, 1982), p. 85.

(62) Samuel Rabinove, "Toward an Immigration Policy," *Commentary,* vol. 71, no. 2 (February, 1981), p. 56.

(63) Quoted in Peter H. Smith, *Mexico: The Quest for a U.S. Policy* (New York: The Foreign Policy Association, 1980), p. 25.

(64) Richard L. Strout, "Were U.S. Defense Is Weak," *Christian Science Monitor* (January 7, 1983); cited in *Congressional Record-Senate,* vol. 129, no. 3 (January 25, 1983), p. S51.

(65) Rob Gurwitt, "Widespread Political Efforts Open New Era for Hispanics," *Congressional Quarterly,* vol. 40, no. 43 (October 23, 1982), p. 2707.

(66) Ibid., p. 2708.

(67) *Congressional Record-Senate,* vol. 126, no. 176 (December 12, 1980), p. S16467.

(68) "Mayor: Power to 3rd. coast," *U.S.A. Today,* vol. 1, no. 168 (May 12, 1983), p. 2A.

(69) Kenneth F. Johnson, Miles W. Williams, *Illegal Aliens in the Western Hemisphere* (New York: Praeger, 1981), p. 87; Rabinove, p. 56.

(70) Gurwitt, p. 2709.

(71) Calculated from table in Gurwitt, p. 2708.

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(72) Interestingly, the Department of Justice argued, in FAIR versus Klutznick, that the Constitution does *not* bar illegal aliens from voting for members of Congress and the president. See: *Congressional Record-Senate,* p. S16468. (Decem 12, 1980)

(73) *Congressional Record-Senate,* vol. 127, no. 188 – Part II (December 16, 1981), p. S15752.

(74) "Will U.S. Shut The Door On Immigrants?" *U.S. News & World Report,* vol. 92, no. 14 (April 12, 1982), p. 47.

(75) Tim Schreiner, "More aliens nabbed on our borders," *U.S.A. Today,* vol. 1, no. 168 (May 12, 1983), p. 3A.

(76) Ibid.

(77) John Gonzalez, "Amnesty Plan Luring Aliens, U.S. Agents Say," *Dallas Morning News* (August 29, 1982); cited in *Congressional Record-Senate,* vol. 128, no. 118 (September 9, 1982), p. S11221.

(78) "Congress Grapples With Immigration Issues," *Congressional Quarterly Almanac,* vol. XXXVII (1981), p. 423.

(79) "Our Big Cities Go Ethnic," *U.S. News & World Report,* vol. 94, no. 11 (March 21, 1983), pp. 49-53.

(80) "Banking in New Saigon," *The Economist,* vol. 284, no. 7249 (August 7, 1982), p. 66.

(81) William S. Ellis, "Florida – A Time For Reckoning," *National Geographic,* vol. 162, no. 2 (August, 1982), p. 193.

(82) From the feature article in *Time,* vol. 121, no. 24 (June 13, 1983).

(83) White, p. 364.

(84) Teitelbaum, p. 23.

(85) Judith Lichtenberg, "National Boundaries and Moral Boundaries: A Cosmopolitan View," in *Boundaries,* eds. Peter G. Brown, Henry Shue (Totowa, New Jersey: Rowman & Littlefield, 1981), p. 92.

(86) It should be kept in mind that the McCarran-Walter Act is viewed by liberals as an extension of traditional policy rather than a measure departure from it. Charles Keely ("The Development of U.S. Immigration Policy Since 1965," *Journal of International Affairs,* vol. 33, no. 2 [Fall/Winter, 1979], p. 250) wrote that it "reflected post-war xenophobia and cold war attitudes....that it underscored the restrictive legacy of American immigration history." Teitelbaum criticised the Act's definition of refugees as "narrowly anti-communist (p. 32)." And John Charles Daly, moderator in a debate on the subject (*Should US Immigration Policy Be Changed?* [Washington, D.C.: American Enterprise Institute for Public Policy Research, 1980], p. 1) stated the Act was "transparently biased to keep a lid on immigration and to give overwhelming priority to those of Anglo-Saxon and Nordic origins." These statements reflect not only political bias disgused as scholarly opinion, but also ignore the fact that northern and western Europeans accounted for only 37.3% of European immigrants during the 1952-1965 period, and but 17% of all immigrants entering the U.S.

(87) Lichtenberg, p. 92.

(88) "Will U.S. Shut Door On Immigrants?," p. 47.

(89) Lichtenberg, p. 93.

(90) George F. Will, *The Pursuit of Virtue and Other Tory Notions* (New York: Simon & Schuster, 1982), pp. 305-6.

(91) Ben J. Wattenberg, "This New Nation of Immigrants," *The American Spectator,* vol. 15, no. 2 (February, 1982), p. 39.

(92) Ibid.

(93) Ibid. Note also that this is, approximately, the view of the popular neoconservative economic writer, George Gilder. He believes that prohibition of immigrants would be "immoral" and "self-destructive." Moreover, Mr. Gilder proceeds several steps further than Professor Wattenberg when he states that those immigrants

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who are illiterate in English shall be examples of capitalist wisdom by virtue of the fact that they are "exempt from the blandishments of the welfare culture as it reaches out hungrily toward the new arrivals (*Wealth And Poverty* [New York: Basic Books, 1981], pp. 67, 167)."

(94) David Owen, *Human Rights* (London: Jonathan Cape, 1978), p. 73.

(95) Ibid., p. 79.

(96) Ibid., p. 73.

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CHANGING PATTERNS OF IRANIAN-ARAB RELATIONS

By Nader Entessar

Iran's relations with the Arab world have undergone major fluctuations both before and after the Iranian revolution of 1978-79. Because of Iran's strategic location on the Persian Gulf, its vast reserves of oil and natural gas and its large population of 43 million, the country's policies toward the Arab world have major implications for the Middle East in general, and the the Persian Gulf region, in particular.

Britain's withdrawal from the Persian Gulf at the end of 1971 propelled Iran to fill the "vacuum" created by Britain's departure. Under the Shah, Iran began to project itself as a regional "superpower." The three strategic Persian Gulf islands of Abu Musa, Greater Tunb and Lesser Tunb were occupies by Iranian troops. However, Iran renounced its long-standing claim on Bahrain, and that island became an independent Arab state.

Another dimension of the Shan's Persian Gulf policy was his military intervention in the Dhofar province of Oman (at the request of Sultan Qabus), which contributed to the defeat of the Marxist guerillas of the Popular Front for the Liberation of Oman and the Arab Gulf (PFLOAG). Although the Shah's intervention was viewed by the Arabs as yet another Iranian move to dominate the Persian Gulf, it nevertheless received tacit approval of the conservative Arab regimes, especially Saudi Arabia. In fact, Iran and Saudi Arabia had agreed in the 1960s to cooperate to prevent the spread of revolutionary forces in the Persian Gulf region.(1)

The Shah's de facto recognition of Israel and his regime's close military collaboration with Tel Aviv, while expressing his sympathies for the Palestinian cause, remained a major point of disagreement between Iran and the Arab world and a major cause of tension between the Shah and Egyptian President Gamal Abdul Nasser. Nevertheless, by the end of the 1970s, Iran had established constructive relations with most Arab states, save such "radical" states as Libya, Iraq and the People's Democratic Republic of Yemen.(2)

The Iranian revolution brought changes to the patterns of Iranian-Arab relations. As we will see later, the Islamic Repub-

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lic of Iran has been opposed more vehemently by conservative regimes than the Shah's government had been in the past. This is partly due to the fact that Ayatollah Khomeini has represented a new kind of activist leadership in the Middle East. The initial popularity of the Iranian revolution with the Arab masses stemmed from Khomeini's ability to "defy Western governments that had previously been believed to have coercive powers over Middle Eastern countries. And, like Nasser, he is widely admired for the simplicity of his life."(3) This, of course, is in sharp contrast to the lavish and extravagant lifestyle of many conservative pro-Western Arab leaders.

The Shah's policy toward the Arab World was a reflection of his perceptions of Iran's security needs. The Persian Gulf region was the focal point of the Shan's concern. Consequently, his Middle East policy at any given point in time was shaped by his perception of each Arab state's contribution to the security and stability of the region.(4) In the 1970s, in pursuit of the elusive goal of regional stability, the Shah endeavored to establish a "special" relationship with three Middle Eastern countries: Saudi Arabia, Israel and Egypt.

In terms of Iranian-Saudi relations, the Shah took a major step in allaying Saudi Arabia's fear of Iranian "expansionist" designs in the Persian Gulf when he announced in January 1969 that Iran would never resort to force to reincorporate Bahrain into Iran.(5) The Shah further abided by his New Delhi pledge when he accepted the results of a U.N.-supervised plebiscite in Bahrain which gave the people of that island an opportunity to express their overwhelming desire to become an independent sovereign state after the British military withdrawal from the Persian Gulf.

The settlement of the thorny Bahrain issue allowed Iran to successfully reach agreements on a wide range of issues with the littoral states of the Persian Gulf, including Saudi Arabia. Furthermore, in 1971 the Shah dropped his long-standing objection to the creation of a new state, the United Arab Emirates (UAE), a confederation of small sheikdoms on the Persian Gulf. Iran's opposition was based largely on the assumption that the UAE would strengthen the "Arabism" of the Persian Gulf.(6) In return, as mentioned earlier, Iran reached an understanding with Great Britain to reassert its traditional claim over the islands of Abu Musa and the Greater and Lesser Tunbs.

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Iran's occupation of these islands, along with the Shah's arms build-up and his willingness to project the country's military power in the Gulf region, created some friction between Iran and Saudi Arabia. Nonetheless, the areas of cooperation were more numerous and the Shah was cognizant of Saudi Arabia's growing importance as a major economic power in the Arab world. Therefore, the Shah tried to avoid alienating the Saudi leadership and to limit Iranian-Saudi rivalry to political rather than military realms.

Iranian-Egyptian relations underwent a major transformation in the 1970s. For most of the 1950s and 1960s, President Nasser's Arab nationalism collided with the Shah's pro-Western postures. Furthermore, Nasser's attempts to encourage the secession of the oil-rich southern Iranian province of Khuzestan and Iran's emerging relations with Israel remained major obstacles to friendly relations between Iran and Egypt.(7) Following the 1967 Arab-Israeli war, the Iranian government extended an olive branch to Egypt by taking the position that "Israel's occupation of Arab lands, for whatever purpose, was contrary to the United Nations Charter and was, therefore, illegal and unacceptable."(8) Hostile propaganda on both sides was also reduced substantially and the two countries re-established bilateral relations in 1970 after a ten-year hiatus in diplomatic relations.

Shortly after Nasser's death in 1970, when Anwar al-Sadat became Egypt's President, Iranian-Egyptian relations displayed signs of improvement. A number of factors contributed to this. First, Sadat's growing pro-Western and anti-Soviet behavior mirrored the Shah's foreign policy objectives. Secondly, the Shah's interest in counterbalancing radical Arab influence in Egypt prompted his regime to offer annual subsidies and economic aid to Sadat's administration to rebuild the Egyptian economy. Thirdly, the Shah's perception of security in the Persian Gulf entailed an overall stability in the Middle East and the resolution of the Arab-Israeli conflict. The Shah was hopeful that Sadat could be encouraged to play the role of "peacemaker" by negotiating with Israel, and the Shah was one of the few non-Western world leaders who supported the Camp David accords immediately after their signing. Finally, a personal friendship had developed between Sadat and the Shah which strengthened Iranian-Egyptian relations for much of the 1970s.

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This friendship was reflected in Sadat's offer of sanctuary when the Shah was overthrown in 1979 and again after the Iran-U.S. hostage crisis in 1980, when Sadat became the only world leader who accepted the Shah and provided a haven for him until his death.(9)

Iran's relationship with Israel had its genesis in 1950 when the Shah's regime extended de facto recognition to the Jewish state, much to the dismay of most Arab countries. Despite Iran's objection to the continued occupation of the Arab land captured by Israel in the 1967 war, the Shah's regime maintained close relations with Israel in economic and military fields.(10) Iran's trade relationship with Israel was quite extensive. Israeli exports to Iran had reached over $70 million by the mid-1970s, and Iran was the main supplier of oil to Israel during the Shah's regime. This relationship became especially important after 1975 when Israel surrendered the Sinai oil fields of Abu Rudeis to Egypt. According to one account, a secret clause in the Egyptian-Israeli Sinai disengagement treaty stipulated that Iran would undertake appropriate measures to satisfy all of Israel's future petroleum needs once Israel lost her access to Sinai oil.(11)

Perhaps the most important aspect of Iranian-Israeli relations revolved around the military-intelligence axis. Israel's intelligence network, Mossad, and Iran's security organization, SAVAK, were in close contact for nearly 25 years. The extent of their cooperation ranged from the exchange of information to providing training for a number of SAVAK officials, both in Iran and Israel.(12) Military training was also provided by the Israelis for Iranian officers, and Iran became a major purchaser of arms from Israel in the last decade of the Pahlavi monarchy.

In short, the creation of a Tehran-Cairo-Tel Aviv axis, with a secondary role for Saudi Arabia, was a major goal of the Shah's policy toward the Arab Middle East. By developing ties to both Israel and many Arab states, the Shah had hoped to be able to "exert more pressure on the principal protagonists in the Arab-Israeli dispute,"(13) and hence, play an active part in the resolution of that conflict which he considered to be a major source of instability in the region. By the same token, since the Shah believed that conservative Arab rulers provided "continuity and predictability" and that they were the only "available bulkhead against the tides of virulent ethnic nationalism,

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Marxism and anarchy in the Arab world..."(14); he was therefore careful to exercise caution in his dealing with such regional rivals as conservative Saudi Arabia and radical Iraq.

The Islamic Republic of Iran and the Arab World

The Islamic revolution which overthrew the monarchy in Iran in 1979 introduced new uncertainties to Iranian-Arab relations. The regime's religious overtones brought a new dimension to Iran's foreign policy, Pan-Islamism, while discarding some old ones. First of all, Iran's perception of its security changed dramatically. Former supporters of the Shah's regime, especially the United States, were now perceived to be major threats to the country's stability. As a result, Iran's attitude toward the region was determined by the relationship of each country in the region toward the United States. Therefore, the conservative pro-Western Arab regimes, particularly Saudi Arabia, began to view the new Iranian regime of Ayatolla Khomeini as a threat to their own stability. Similarly, Pan-Islamic proclamations of Khomeini and his exhortions to the Arab masses to follow Iran's example and overthrow their own "corrupt" governments and to create a united Islamic front against the "enemies of Islam" further contributed to the already tense situation in the region. Moreover, the Saudi royal family's claim to the leadership of the Islamic community has been challenged by Ayatollah Khomeini who has alleged that the Saudi monarchy is corrupt and morally incapable of acting as the guardian of Islamic holy places. Iranian officials have been quick to point out King Fahd's overseas exploits and his reputation as a "playboy" when he was the Saudi crown prince just before King Khaled's death in mid-1982. Iranian-Arab tension has manifested itself in several arenas.

First, in the annual *haj* (pilgrimage) to Mecca in 1981, the conflict between Saudi police and Iranian pilgrims who had demonstrated against the U.S. and Israel, advocating Khomeini's philosophy of revolution. In an exchange of letters with King Khaled, Khomeini virorously criticized the Saudis, saying that the only guilt of the Iranian pilgrams was to downgrade "satanic" America and to protest the occupation of Islamic holy places by Israel.(15) The Saudis, on their part, called the fundamentalist theocracy in Iran "un-Islamic." A Saudi Arabian broadcast called the Iranian rulers a "disgrace to Islam. They

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have wronged Islam and brought disrepute to its followers. In fact, the rulers of Iran have nothing to do with Islam."(16)

The regular exchange of acrimony between Iran and Saudi Arabia peaked once again during the 1982 and 1983 *haj.* This time, the Saudis moved swiftly to arrest pro-Khomeini demonstrators and expelled hundreds of Iranian pilgrams, along with Hojatoleslam Mohammed Hussein Musavi Khoiniha, Khomeini's personal representative and the supervisor of the Iranian *haj* delegation.(17) Once again, Tehran accused Riyadh of acting on orders of "satanic America" and of preventing millions of Moslem pilgrims from joining the Iranian *haj* delegation in denouncing U.S. policy in the Middle East.

Another major point of contention between Khomeini's Iran and the Arab states is the often made claim by the latter that Iran routinely intervenes in their domestic affairs by either inciting the local Shiite population or using "saboteurs" in an attempt to overthrow their regimes. In December 1980, Bahrain announced the arrest of a group of "plotters" who were alleged to have been trained by Iranians for the purpose of overthrowing the Bahrain government and creating an Islamic republic on that island. This claim was vehemently denied by Tehran. The announcement, nevertheless, "triggered a wave of anxiety in the region, brought a massive expression of Arab support to Bahrain, for many years a target of occasional Iranian territorial claim."(18) Also, the 1983 bombing of the American Embassy in Kuwait, which was attributed to pro-Iranian elements, further heightened Arab-Iranian tension.

Iranian views on oil pricing and production policies have been another major source of friction between Tehran and other oil producing countries of the Persian Gulf. The Khomeini regime has blamed Saudi Arabia for overproduction of oil and the creation of the current glut in the market. By branding the Saudi regime as "a puppet of the West,"(19) the Iranian regime has endeavored to isolate Saudi Arabia and reduce its influence on OPEC pricing and marketing decisions.

Allocation of the production ceiling among OPEC's members – a move engineered in 1981 to maintain order in the pricing structure – was perceived by Iran to be disadvantageous to its position. Consequently, Iran surpassed its quota of 1.2 million barrels of oil per day and was believed to have been exporting between 2 to 2.5 million barrels per day until mid-1984. The

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escalation of Iraqi attacks on Iran-bound ships in the Persian Gulf has since reduced Iranian oil exports. In the December 1982 OPEC ministerial meeting, Iran argued that OPEC production quotas for each member country should be based on four factors: a country's oil resources, its need for foreign exchange, its population and the quantity of its petroleum exports in the past decade. The implementation of these proposals would be disadvantageous to the Arabs, especially the largest oil producer, Saudi Arabia. Iran's vast oil reserves, its continuing need for foreign exchange, its population of 43 million and its position as the second largest OPEC oil producer before the revolution would all work in its favor. To counter Iran's demands, the Arabs engineered a move which bypassed the election of a new OPEC secretary general when it was Iran's turn to fill that seat.

The Gulf Cooperation Council (GCC)

A further move to contain Iran's regional influence was the creation of the Gulf Cooperation Council. This was established in 1981 by the conservative Gulf regimes of Saudi Arabia, Kuwait, Bahrain, United Arab Emirates, Qatar, and Oman to coordinate their social and economic policies and devise unified military and security programs.(20) Although the ostensible military aim of the Gulf Cooperation Council was to coordinate security against possible internal and external subversion, the GCC was perceived by Tehran to be a pro-Western scheme directed against the Islamic Republic of Iran.

The Iranian clerics warned the GCC that Tehran would not allow any country or group of countries to act as the policeman of the Persian Gulf. President Ali Khamanei warned the GCC members of Iran's determination to "crush" any external plots against the country. In a broadcast on Radio Tehran. Dr. Ali Akbar Velayati, Iran's Foreign Minister, asserted: "As the strongest country in the region, we remind those who have ignored our presence that even the U.S. could not do anything against the will of our people."(21) The Speaker of the Iranian Parliament went even further by stating: "All of you together do not even constitute a major city. Your plots are not a problem for the Islamic Republic of Iran."(22) Nevertheless, the Iranian leaders took pains to reassure the Arab regimes that Iran had no territorial claim on them and that it sought relations with all states that are not under "U.S. control" and are not

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"U.S. lackeys, like Egypt and Morocco."(23) In April 1984, Iran offered a peace proposal to GCC members which would guarantee the territorial integrity of each member state against outside interference.

Iran, Israel and the PLO

Another source of continued tension between the Islamic Republic and Arab regimes has been the alleged Israeli arms sales to Iran, despite Khomeini's vehemently anti-Israeli pronouncements. The reports of Israeli-Iranian arms deals were first made public by an article in the *Sunday Times* of London and were later substantiated by other sources, including the exiled former Iranian President, Abolhassan Bani Sadr.(24) Apparently, the war with Iraq and Iran's need for spare parts for its American-made military hardware prompted the regime to purchase needed equipment from any available source, including Israel. In September 1980, Israeli officials notified the U.S. administration of Iran's desire to purchase American-made military equipment from Israel. According to one account, because of the delicate negotiations over the American hostages held in the U.S. embassy in Tehran, the Carter administration did not act positively at that time. The Israeli government, nonetheless, proceeded to sell Iran spare parts for its F-4 fighter, M-60 tanks, and a host of other items.(25)

The first concrete evidence of the alleged Iranian-Israeli arms deal surfaced in July 1981 after an Argentinian cargo plane was intercepted and shot down in the Soviet Caucasus. The Swiss partner of the aircraft's pilot admitted after the crash that the plane "had been on the third of a series of 12 planned flights which were to transport 360 tons of arms from Tel Aviv to Tehran, via Larnaca in Cyprus."(26) The Israelis have been reticent about these reports and the Israeli officials, including Prime Minister Shamir, have maintained that their government does not wish to see either an Iranian or an Iraqi victory in the Gulf War. The Iranian government, for its part, has denied the validity of any arms deal with Israel and has called these allegations a conspiracy against the Islamic revolution by the enemies of Islam.(27) Regardless of their validity, the accusations had already damaged the tenuous Arab-Iranian relations. Not only the conservative Arab regimes considered these as evidence of Iran's "un-Islamic" character, but some of the "friendly" Arab

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forces also began to turn away from Iran, the most notable of which was the Palestine Liberation Organization (PLO).

After the victory of the Iranian revolution, no Arab group was more jubilant about the prospect of a pro-Palestinian Iran than was the PLO. In fact, the PLO not only received the building formerly housing the Israeli mission in Tehran, but it was also allowed to set up its network of supporters throughout Iran to collect funds for Palestinian guerrillas.(28) However, Iran-PLO relations began to deteriorate gradually. From the PLO's point of view, Iran's demands that it expel all non-Islamic and leftist elements from its ranks and sever its ties with the Arab states of the Gulf were not only impractical, but an undue interference in Palestinian internal affairs. From the Iranian vantage point, the PLO had abandoned its revolutionary posture and was now following a compromising policy vis-a-vis Israel and the conservative Arab regimes. Iranian-PLO problems became particularly acute when the PLO chairman, Yassir Arafat, accepted the so-called "Fahd plan" for peace in the Middle East. The eight-point plan included the implicit recognition of pre-1967 Israel. Several Iranian officials asked that the PLO office in Tehran be closed and chants of "Death to Fahd! Death to Arafat!" were routinely heard in daily political demonstrations in Iranian cities.(29) Moreover, meetings between PLO officials and the Iranian opposition figures in Paris have also contributed to the current freeze in Iran-PLO relations.

The Lebanese Civil War

The plight of the Lebanese Shiite Moslems, the single largest religious group in Lebanon, was a major point of concern for Ayatollah Khomeini when he came to power. The affinity between Iranian and Lebanese Shiites was reinforced by the fact that the charismatic leader of the Lebanese Shiites, Imam Musa Sadr, was an Iranian cleric. Also, one of the first paramilitary Shiite organizations in that country (AMAL) owes its existence to another Iranian figure, Mustafa Chamran, who later became Minister of Defense in the revolutionary government in Tehran.(30) The victory of Iran's Islamic revolution gave a major boost to the largely impoverished Shiites, and the Islamic Republic readily sought to provide assistance to its coreligionists in the war-torn nation of Lebanon.

The Israeli invasion of Lebanon in June 1982 prompted Iran

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to take a more active role in Lebanese affairs. In addition to sending financial aid to Lebanese Shiites, Iran dispatched some 500 *pasdars* (revolutionary guards) to protect them and to coordinate their paramilitary activities. This has led to tensions between the newly-established Lebanese government and Tehran. The situation became especially troublesome in November 1982 when a group of people in the predominantly Shiite city of Baalbek in northern Lebanon attacked army barracks and burned Lebanese flags and pictures of President Amin Gemayel. The Lebanese government blamed the Iranian revolutionary guards for participating in the attack, but Iran denied the allegation. Nevertheless, the Iranian government indicated that it would be happy to provide arms and ammunition to the Lebanese Shiites.(31)

In the meantime, Hussein Musavi, a Lebanese Shiite leader in Baalbek, announced he would enlist the help of the Iranian revolutionary guards to "work for the establishment of an Islamic Republic in Lebanon and to spread the Iranian revolution to all the Arab states."(32) It was Mussavi's group, the Islamic AMAL, a fundamentalist offshoot of the original AMAL, which was blamed for the 1983 suicide bombing of the American Marine headquarters in Beirut. However, because of Iran's distance from Lebanon, it is questionable how effective its assistance could be to the Lebanese Shiites.

Iran-Iraq War

The most troublesome aspect of Iranian-Arab relations has been reflected in the Iran-Iraq conflict. Iraq was the only neighboring country whose relations with Iran began to deteriorate immediately after Khomeini's accession to power. Of course, the Iran-Iraq conflict is a long-standing one which dates back to Ottoman-Persian rivalry, but in recent years it has revolved around the boundary dispute over the Shatt al-Arab river.(33)

During the last few years of the Pahlavi monarchy, Iran and Iraq had succeeded in removing major obstacles to the normalization of their relations. A major step in this regard was taken when both countries in 1975 signed the Algiers agreement during an OPEC meeting in Algeria. As a result, major issues dealing with boundary disputes over the Shatt al-Arab and land boundary demarcations were resolved. Furthermore, Iran

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agreed to stop funding military aid to insurgent Kurds in northeast Iraq who were destablilizing the Iraqi regime.(34)

After the Shah's downfall, it was obvious that Khomeini's pan-Islamic views would be perceived by the Iraqi regime as a threat to its secularist ideology. That is, the Iraqi regime was apprehensive that Khomeini's exhortations would spill over to their country and would incite the Shiites (over 55% of Iraq's population) to emulate the Iranian example. In fact, the Iraqi officials on numerous occasions have expressed fear that the Shah's policy would be discarded by the Khomeini regime in favor of "exporting" the Islamic revolution to Iraq.(35) Indeed, the Iranian clerics had already labeled Iraqi Baath socialism as "atheistic" and hence, anti-Islamic. Furthermore, Iran continued to provide material and moral support to the major Shiite underground opposition in Iraq – *ad-Dawa al-Islamuyyah* (The Islamic Call) – and to Iraq's eminent Shiite religious leader, Ayatollah Mohammad Bagher al-Sadr.(36) Iraq's response to the Shiite movement was swift and harsh as the regime arrested and executed several *Dawa* members, and in June 1979 imprisoned Ayatollah Sadr and later executed him. In addition, several thousand Iraqis of Iranian descent were expelled from their homes and forced to go to Iran as refugees. All these made the Iranian regime more determined to dispatch Saddam Hussein's regime, in Khomeini's words, "to the refuse bin of history."(37)

Nothwithstanding the Iraqi claim that the Khomeini regime, through its interference in the domestic affairs of Iraq, provoked the latter to launch a full-scale invasion of Iran on September 22, 1980, there is much reason to believe that Saddam Hussein attacked Iran to establish Iraqi hegemony over the Persian Gulf by toppling the Khomeini regime. As one observer has noted, the Iraqis "were quite happy to see Khomeini call for a revolt and carefully nurtured the conflict along the Iran-Iraq border so as to heighten tensions."(38)

Due to the Khomeini regime's virtual destruction of the command structure of the Shah's armed forces, and because of Iran's international isolation over the American hostages in Tehran, President Saddam Hussein embarked upon a military adventure which was represented by Iraq's regime as "Saddam's Qadissiyeh" – named after the seventh century victory of the Arabs over the Persians at Qadissiyeh. Confident of victory,

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Iraq had already abrogated the Algiers agreement, hoping it would be able to force the Iranians to renounce control of their side of the Shatt al-Arab and accept total Iraqi sovereignty over the navigational rights of this river. The former Iraqi Foreign Minister, Saddoun Hammadi, was so confident of victory that he boasted that now Iraq would be able to redefine its land and water frontier with Iran on its own terms.(39) Similarly, many Western analysts were quick to write an epitaph for the Khomeini regime, and the exiled Iranian generals were reported to be mapping their return to power in Tehran.(40)

But as events turned out, following the loss of their port city of Khoramshahr and the destruction of their major cities in the Khuzestan province, the Iranians regrouped and in a series of counter offensives, drove the Iraqi invaders back to their own land. The Iranian troops have even entered the Iraqi territory and captured small parcels of land around Mandali in the central border and Majnoon Islands in the southern frontier region. The prospect of an Iranian victory over the most powerful Arab state in the Gulf is frightening to the conservative Arab elite. For this reason, they have contributed over $35 billion to Iraqi's war chest, and some, like Jordan and Egypt, have sent "volunteers" to fight on the side of their Iraqi "brothers." Iraq's inability to defeat Iran, even with this massive influx of Arab financial and military aid, has prompted the conservative Arab regimes to offer as much as $25 billion as war reparation to Iran if it will accept a cease-fire. However, Iran's desire to annihilate Saddam Hussein's regime and establish an Islamic republic of Iraq has remained Tehran's paramount objective in the war. The seriousness of the Iranian goals is manifested in a recent decision by the country's Supreme Defense Council to allow the revolutionary guards to set up military bases for anti-Saddam Iraqis inside Iran. A "Revolutionary Islamic Parliament of Iraq" has also been established in Iran to supervise conscription of Iraqi soldiers to operate from these military bases. The man groomed by Iran to replace Saddam Hussein is Seyyed Mohammad Bagher Hakim, the son of a prominent Shiite leader in Iraq, the late Ayatollah Mohsen Hakim.(41)

The Iraqi response to the Iranian strategy has been to regionalize and ultimately internationalize the war in the hope that the combined efforts of exogenous forces would compel Iran to

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abandon its bellicosity in the Gulf conflict. A second Iraqi strategy has revolved around denying Iran export of its oil, thereby increasing economic pressure on Tehran. To this end, Iraq has declared the northern Persian Gulf region around the Iranian ports a "war zone" and has continually attacked cargo ships and tankers approaching the Iranian shores.

A further ominous development in the Iran-Iraq conflict has been the Iraqi use of chemical weapons, which were outlawed by the 1925 Geneva Convention. Despite Iraq's protestations to the contrary, the United States and other independent observers have reported evidence of the use of mustard gas and similar chemical war agents by Iraq.(42) Furthermore, Baghdad is also reported to have used napalm bombs to thwart major Iranian "human wave" offensives since 1983.(43)

Threat to the Persian Gulf

While the use of chemical weapons, live electric wires and napalm may have helped to stall Iranian counterattacks, they have not brought about major changes in Iraq's favor. What has worked in Baghdad's favor, at least for the time being, has been Iraq's continous attacks on the Persian Gulf ships. As a result of these attacks, Iran has threatened to close the Strait of Hormuz, the 20-mile-wide strategic "choke point" in the Persian Gulf through which much of the oil exports of the littoral countries must pass. Of course, the Iranian leadership has been careful to emphasize that it will attempt to close the Strait of Hormuz only if Iran is totally denied shipment of its oil due to Iraqi attacks on oil tankers approaching Iran's main oil terminal on Kharg Island.

The threat of closure of the Persian Gulf to international shipping was the catalyst for the future involvement of regional powers, especially Saudi Arabia, in the Iran-Iraq war. From the Iranian government's perspective, Saudi Arabia has, from the outset, been an active participant in the Persian Gulf conflict. Not only has Saudi Arabia provided Iraq with much of the $35 billion it has received as soft loans from the conservative Gulf states; it is also accused of providing Iraq with military data obtained through the four AWACS radar planes based in Saudi Arabia. Although the latter Iranian claim might be more speculative than real, Iranian news reports accuse Iraqi President Saddam Hussein of acknowledging receipt of AWACS-obtained data

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from Saudi Arabia.(44) These developments have caused the Iranian leadership to reject Saudi Arabia's claim to neutrality in the Iran-Iraq war, and to accuse the Saudi Royal family of masterminding the Iraqi stategy of attacking Iran-bound ships.(45)

It was this perception of Saudi Arabia's role in the Gulf conflict that is believed to have prompted Iran to retaliate against Saudi-bound tankers, hence bringing about a new dimension to Iranian-Arab relations, and causing greater active American involvement in the Persian Gulf conflict. The Reagan administration's immediate response to the May 1984 escalation of the Gulf conflict was to supply Saudi Arabia with 400 shoulder-fired surface-to-air Stinger anti-aircraft missiles. These heat-seeking missiles would presumably enable the Saudi forces to defend Saudi interests against low-flying Iranian aircraft and helicopters. Furthermore, in order to enhance the capability of Saudi Arabia's F-15 Eagle fighters, the United States also dispatched a KC-10 aerial tanker to refuel the F-15s in the air, thereby allowing them to stay airborne for sufficiently long periods to enable them to effectively deter potential Iranian attacks on Saudi oil facilities.

Iranian-Arab tensions reached a new height on June 5, 1984 with the downing of two Iranian F-4 Phantom jets by Saudi F-15 fighters off Al-Arabiyah Island, a Saudi Arabian island located 40 miles off the Saudi Arabian coast. This marked the first incident involving non-Iraqi Arab aerial attacks on Iranian targets, but to the surprise of the world, both Saudi Arabia and Iran downplayed the significance of the incident. The official Saudi communique referred to downed Iranian F-4s only as "aerial targets" and hoped that this "strange event" would not be repeated. The Iranian government for its part issued an unusually non-rhetorical statement regarding the incident: claiming that the F-4s were over international waters and not Saudi airspace, the Iranian government also expressed its desire to avoid similar incidents in the future in order to preserve the security of all Persian Gulf countries.(46)

Despite the minimization of the above incident by both Iran and Saudi Arabia, it is now evident that regional states are being drawn, albeit slowly, into the Iran-Iraq confrontation, thus turning it into an Arab-Iranian conflict with implications which extend beyond the Persian Gulf region and which could further divide the already fractured Arab community. This was evident

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in the May 1984 meeting of the Arab League in which the League, ignoring its tradition of unanimity, overriding Libyan and Syrian objections, branded Iran as the aggressor in the Gulf conflict, without condemning Iraq's numerous attacks on international ships in the Persian Gulf.(47)

Moreover, the Arab League, by reemphasizing the provision in its charter which defines any aggression against one Arab state as an aggression against all other Arab nations, signaled its intention that the Gulf war should not be simply viewed as a border or ideological conflict between two neighboring states, but as a conflict between all Arabs and what they see as Iranian "expansionism." All the GCC member states have already taken major steps in military cooperation to present a united front of Arab Gulf states against Iran in its war with Iraq. As GCC Secretary General, Abdullah Bishara, recently stated, the GCC must "drive home to Iran the futility of continuing this war."(48)

Military Imbalance

Even without direct military intervention by the conservative Arab states on it side, Iraq already enjoys overwhelming military superiority in most categories of equipment against Iran. Iraq's fleet of French-made Mirage and Super Etendard aircrafts and Soviet-supplied advanced MiG fighters, totalling in all some 400 planes, outnumber Iran's 50 operational fighter planes, which are mostly of older American-made F-4 and F-5 Phantom variety.(49) Furthermore, shipments of Soviet-made air-to-surface missiles (AS-4, AS-5 and AS-6) and SS-12 surface-to-surface missiles to Iraq have given Iraq the capacity to attack targets deep inside Iran. All these are advanced weapons and have a relatively long range, with the SS-12 possessing a range of 480 miles. If the Iran-Iraq conflict were susceptable to a military solution, the war would already have been resolved in Iraq's favor. But there is no ready solution to the Persian Gulf conflict. Probably the war will continue to take its heavy toll until one of the two belligerents undergoes a major transformation in its political leadership and/or system. No major military breakthrough will be achieved by either side in the foreseeable future.

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Conclusion

The Iran-Iraq war, more than any other single factor in recent years, has brought about a major shift in the constellation of power in the Middle East. In response to developments within Iran, the conservative Gulf states have disembarked upon their own programs of "Islamization" aimed at minimizing the possibility of Iranian-style uprisings in their own countries. On the other hand, some countries, such as Saudi Arabia and Oman, have been led to rely more heavily on the U.S. for the maintenance of their security. Even Iraq, which has had a friendship treaty with the Soviet Union, tended to shift its policy away from Moscow and towards the United States. Furthermore, such factors as the willingness of the U.S. to project itself militarily to save unstable regimes in the Persian Gulf, will have a major impact or the region during the long run.

Another major implication of the Iran-Iraq war has been the inevitable polarization of the Arab regimes, pitting the pro-Soviet Libya, Syria and South Yemen (all of whom support Iran) against the pro-Western Arab states. This partly explains the Arab impotence in face of the Israeli invasion of Lebanon and the current state of paralysis in inter-Arab politics.

All the Arab regimes' attempts at "Islamization" and reformism have so far been nothing more than, as Fouad Ajami puts it, "a frantic attempt to quarantine the Iranian upheaval, to dany the relevance of Iran to the Arab situation."(50) The Iranian revolution has been seen by many as a warning for the Arab elite not to embark on half--hearted modernization and Western-style reforms, if they seek to prevent the "export" of the Islamic revolution to their countries. Revolution is not a commodity that can be easily exported without an internal "market." Without the internal socio-political prerequisites, no revolution can be "exported" successfully from one country to another. But, as the case of Iran under the Shah illustrated, regime maintenance is not merely or even necessarily a function of economic prosperity or of technical "modernization," nor is it enhanced through militarization. It depends primarily upon the perception of the legitimacy of the regime by those who are governed. That is the lesson which was apparent to all in the recent history of Iran, and which is today increasingly relevant to any competant speculation on the future history of the Arab states.

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FOOTNOTES

(1) *New York Times,* 17 November 1968.

(2) For a brief summary of Iran's relations with the Arab world during the Shah's regime, see Amin Saikal, *The Rise and Fall of the Shah* (Princeton, NJ: Princeton University Press), pp. 164-71; Ahmad Ghoreyshi and Cyrus Elahi, "Iran's Foreign Policy," in *Iran: Past, Present and Future,* ed. Jane W. Jacqz (New York: Aspen Institute for Humanistic Studies, 1976), pp. 373-78, and Shahram Chubin, "Iran's Foreign Policy 1960-1976: An overview," in *Twentieth Century Iran,* ed. Hossein Amirsadeghi (London: Heinemann, 1977), pp. 203-9.

(3) Roy Parviz Mottahedeh, "Iran's Foreign Devils," *Foreign Policy,* no. 38 (Spring 1980), p. 33.

(4) For a description of Iran's perception of its security, see Alvin J. Cottrell and James E. Dougherty, *Iran's Quest for Security* (Cambridge, MA: Institute for Foreign Policy Analysis, 1977), pp. 5-11, and Shahram Chubin, "Iran's Defense and Foreign Policy," in *Iran in the 1980s,* eds. Abbas Amirie and Hamilton A Twitchell (Tehran: Institute for International Political and Economic Studies, 1978), pp. 323-29.

(5) Saikal, p. 164.

(6) For a detailed description of this issue, see Shahram Chubin and Sepehr Zabih, *The Foreign Relations of Iran: A Developing State in a Zone of Great Power Conflict* (Berkeley: University of California Press, 1974), pp. 215-28.

(7) Ibid., pp. 140-69.

(8) Ibid., p. 163.

(9) The Shah's immediate family continued to maintain a residence in Egypt where the Shah's eldest son has declared himself the rightful heir to the Pahlavi throne.

(10) For further details of Iranian-Israeli relations, see Robert B. Reppa, *Israel and Iran: Bilateral Relationships and Effects on the Indian Ocean Basin* (New York: Praeger, 1974); Marvin G. Weinbaum, "Iran and Israel: The Discrete Entente," *Orbis* 18 (Winter 1975): 1070-87; R.K. Ramazani, "Iran and the Arab-Israeli Conflict," *Middle East Journal* 32 (Autumn 1978): 413-28, and Fred Halliday, *Iran: Dictatorship and Development* (New York: Penguin Books, 1979), pp. 278-80.

(11) *Manchester Guardian,* 10 October 1975.

(12) See Halliday, p. 279. The documents obtained after the seizure of the United States Embassy in Tehran in 1979 also attest to the close Iranian-Israeli relations in the areas of intelligence and military cooperation.

(13) Halliday, p. 280.

(14) Cottrell and Dougherty, p. 9.

(15) *Jomhuriye Eslami* (Tehran), 21 October 1981.

(16) Quoted in *Iran Times,* 20 November 1981.

(17) For details see *Iran Times,* 17 September, 24 September and 15 October 1982.

(18) *Wall Street Journal,* 24 December 1981.

(19) Sepehr Zabih, *Iran Since the Revolution* (Baltimore: Johns Hopkins University Press, 1982), p. 175.

(20) For a description of the programs of the Gulf Cooperation Council, consult Judith Perera, "Caution: Building in Progress," *The Middle East,* no. 78 (April 1981), pp. 8-12.

(21) Radio Tehran (Voice of the Islamic Republic), 23 January 1982.

(22) *Iran Times,* 29 January 1982.

(23) Ibid.

(24) *Sunday Times* (London), 26 July 1981. Also see the *Washington Post* 27 July 1981.

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(25) Phil Marfleet and Edward J. Mann, "Seeking Arms From the Devil," *The Middle East,* no. 87 (January 1982), pp. 20-21.

(26) Ibid., p. 20.

(27) *Jomhuriye Eslami* (Tehran), 2 October 1982.

(28) See Nader Entessar, "Arab Factions in Post-Revolutionary Iranian Politics," *Middle East Review* 12 (Spring 1980): pp. 52-3.

(29) For details see *Iran Times,* 20 November 1981, 29 January, 5 and 12 February 1982.

(30) See Entessar, pp. 53-4.

(31) *Iran Times,* 3 December 1982.

(32) Ibid.

(33) For a historical description of this issue from a highly partisan Iraqi point of view, see Tareq Y. Ismael, *Iraq and Iran: Roots of Conflict* (Syracuse: Syracuse University Press, 1982), pp. 1-27. For a more objective view of the Iran-Iraq conflict, consult Chubin and Zabih, pp. 170-92; Claudia Wright, "Implications of the Iraq-Iran War," *Foreign Affairs* 59 (Winter 1980-81): pp. 275-303, and Adeed I. Dawisha, "Iraq: The West's Opportunity," *Foreign Policy,* no. 41 (Winter 1980-81), pp. 134-53.

(34) For the full text of the Algiers agreement and its related protocols, see Ismael, pp. 60-8.

(35) See, for example, Tareq Aziz, *On Arab-Iranian Relations* (Baghdad: Ministry of Culture and Information, 1980), p. 40.

(36) For an excellent analysis of the genesis and development of the *Dawa* movement, see Hanna Batatu, "Iraq's Underground Shi'a Movements: Characteristics, Causes and Prospects," *Middle East Journal* 35 (Autumn 1981): pp. 578-94.

(37) Joe Stork, "Iraq and the War in the Gulf," *MERIP Reports,* no. 97 (June 1981), p. 4.

(38) Fred Halliday, "A War of Nationalist Ambitions," *In These Times,* 8-14 October 1980, p. 3.

(39) See Hammadi's interview with correspondent Raghida Dergham in *The Middle East,* no. 74 (December 1980), pp. 18-20.

(40) *Times* (London), 26 September 1980; and *Christian Science Monitor,* 1 October 1980.

(41) *Iran Times,* 23 July and 10 December 1982.

(42) See, for example, *New York Times,* 19 March 1984; *Wall Street Journal,* 13 March 1984, and *Sunday Times* (London), 11 March 1984.

(43) *Philadelphia Inquirer,* 16 March 1984.

(44) *Iran Times,* 11 May 1984.

(45) *Kayhan* (Tehran), 19 May 1984.

(46) *Iran Times,* 8 June 1984.

(47) *New York Times,* 21 May 1984.

(48) As quoted in Susannah Tarbush, "Spotlight on Security," *The Middle East,* no. 115 (May 1984), p. 31.

(49) For a succinct analysis of the Iran-Iraq military balance and the evaluation of combat performance of the two countries in the first three years of the Gulf conflict, see Mark Heller, Dov Tamari and Zeev Eytan, *The Middle East Military Balance 1983* (Tel Aviv: Jaffee Center for Strategic Studies, Tel-Aviv University, 1983), pp. 308-316.

(50) Fouad Ajami, *The Arab Predicament: Arab Political Thought and Practice Since 1967* (New York: Cambridge University Press, 1981), p. 182.

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STABILITY AND INSTABILITY IN THAILAND

By Z. Michael Szaz

The old kingdom of Siam escaped colonization in the latter half of the nineteenth century, the result of an uneasy compromise between British expansion to the north of Malaya and French expansion into the Indochina kingdoms. Just as Afghanistan became a buffer between British India and Russia, Siam became a buffer state between the British and French spheres of influence in Indochina and kept its independence until November 8, 1941, the day of the Japanese invasion of Southeast Asia.

Siam, now renamed Thailand, remained officially an independent kingdom in Japan's Greater Asian Prosperity Sphere between 1941-45. For this concession, Siam had to renounce its alliance with the British and accepted Japanese troops on its soil. After the Japanese surrender on September 2, 1945, the newly formed government again cooperated with the Allies. Upon the return of the French colonialists to Viet Nam and the ensuing guerilla warfare by the Communist-dominated Vietminh, Thailand established close relations with the United States and also with Britain. It later became a land base for American presence in Southeast Asia, joining Secretary Dulles' brainchild, the SEATO alliance in Manila in 1954.

Thai foreign policy was always aimed at balancing the regional threat to its security by making an alliance with a major world power of the time. Until 1941, Great Britain served this purpose, after 1946 the United States became the guardian of Thai independence against regional threats. Despite some serious doubts about the American commitment in the wake of the U.S. withdrawal from Viet Nam, and the defeat of American-sponsored Republic of Viet Nam in 1975, Thai policy focused upon fostering close relations with Washington, and after 1975 the Thais also tried without success to establish a detente with the Socialist Republic of Viet Nam, renewing their relations with the People's Republic of China.

Thai relations with the People's Republic of China were rather rocky in the 1950s and 1960s, since the Red Chinese had

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given support to the insurgents in the northeastern provinces since 1954 and did not abandon this policy until the end of 1980. It was only the Vietnamese invasion of Cambodia, and the subsequent cooperation between Peking and Bangkok in transporting Chinese arms to the Khmer Rouge guerillas, that persuaded Peking to abandon its support of the Thai Communists in the northeast.

More than any member of ASEAN, Thailand is a front line state. It faces the politically as well as militarily dangerous threat of Vietnamese aggression that between 1975-80 swallowed all of Indochina and had three times in the past (1980, 1981 and 1983) crossed the Thai border in pursuit of Khmer Rouge guerillas and their non-Communist allies.

Thailand is a middle-sized country of about 320,000 square miles with a population of about 48 million. Its topography creates four distinguishable zones: a) The central plain, dominated by the Mae Nam Chao Phraya river and its tributaries, which forms the center of rice production. b) The northeast, an undulating dry plateau rising about 1,000 feet above the plain, bordered in the east by the Mekong river which separates Thailand from Laos. c) The north, a mountainous region which also extends westwards along the border with Burma. d) The south, which is covered by rain forest that extends into the Malay peninsula.

More than 85% of the population speaks a Thai dialect. The Central Thai dialect is the official language, the second largest is the Thai dialect of the northeast, spoken by about 32% of the population. The Northern and Southern Thai dialects (Chao Pak Thai) are spoken by 7 and 8% of the people respectively. The Chinese minority amounts to seven percent of the population. Thais are nearly all Buddhists and the Buddhist monastic order, the *sangha,* is directly tied to the government hierarchy so that Buddhism is an essential feature of Thai social and political life.(1)

Thailand maintains a mixed economy with a strong private sector, with the government responsible for infrastructure development. Food surpluses are produced by an enterprising, independent smallholder farmer class. Despite the presence of a relative well-to-do peasant class, the economy is still characterized by widespread poverty outside of Bangkok and its environs, which is politically destabilizing because of the

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inequitable distribution of the wealth created by rapid economic development in the last two decades.

Industrial enterprises are concentrated upon Bangkok and the surrounding provinces, and are responsible for 20 percent of the GNP. Mostly consumer goods are produced for the domestic market. Thailand has sufficient oil, natural gas, and lignite (plus a sizeable hydroelectric capacity) to satisfy its energy needs, and is going forward with an ambitious rural electrification program of 13,000 more villages by 1985.

The armed forces form the center of political power. They have a personal strength of 216,000, and are much larger than those of Malaysia. Despite the lapse of the SEATO Pact, there are bilateral security arrangements with the United States, based upon the Rusk-Thanat Communique of 1962.

The post-war history of Thailand may be subdivided into two periods, either on the basis of domestic or foreign policy events. Domestically, the October 1972 student demonstrations, which ushered in an era of a temporary, but highly significant, democracy, served as the watershed in post-war history. In foreign affairs, the 1973 U.S.-North Vietnamese Agreement, which foreshadowed the fall of the Republic of Viet Nam, had a pivotal impact upon Thai perceptions of national security, especially *vis-a-vis* the People's Republic of China and Viet Nam.

Before 1972, the armed forces were only dispensers of political power in Thailand; since that date their hegemony has been constantly challenged by civilian political parties, albeit often without success. In turn, however, the civilian parties are often coopted and utilized by various factions in the armed forces, and retired military persons often take positions of leadership in these, creating a civilian-military mix that continues to rule the country whether it is officially under military or democratic rule.

As in many other countries of the Third World, where active or retired officers control the government, the army never forms a monolith, and after having come to power by a military coup many military commanders have to surrender their authority to another faction of the army which is dissatisfied with their programs and/or personalities.

Democracy remains a fragile flower imported into Thailand from the West. As early as 1955, Prime Minister Phibun enunci-

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ated a policy of *pratchathipata* (democracy) which, given to the country as a gift of the government, was to allow the people to criticize his "open regime." Phibun wanted to put a liberal face on his regime in order to balance the strong influence of his rival, General Sarit, among the military. Phibun organized a new government party, headed by another rival of Sarit named Phao, and the well-financed party was supposed to win the 1957 election. It did so, and Sarit described these elections as "filthy," despite the fact that the government party won only a bare majority. (2)

The elections doomed *pratchathipatal,* which was shelved when university students began large-scale protests against the government and its behavior during the election. The lack of popular support for Phibun's democracy led to an erosion of his power. In the new government General Sarit was named as the Commander-in-Chief of the armed forces, and in September 1957 Sarit broke with Phibun and Phao and displaced them in a bloodless coup. General Sarit's actions were approved by the king, whose family had been opposed to Phibun ever since the 1930s.

In December 1957 elections no party won a parliamentary majority. Thus, Sarit's new government comprised of a loose coalition of parties and individuals willing to back his rule. Because of his poor health, General Sarit named his deputy in the armed forces, General Thanat Kithchachon, as the prime minister. In the words of the author of the history of the period. (3)

> Intraparty wrangling about political and economic spoils plagued Thanom's government, and the inclusion of left wing politicians in the government party further complicated the situation, because of their opposition to the pro-Western foreign policy.

By October 1958 conditions became so chaotic that General Sarit had to take over the government from Thanom. He justified his action by the inability of the past governments and their constitutional experiments, to provide the stability needed to continue economic development. Political parties were outlawed and critics of the regime were jailed. From January 1960 on General Sarit ruled with the help of an interim constitution, but his government was a disguised military dictatorship.

General Sarit's government was more dynamic than those of

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its predecessors. He succeeded in achieving both political stability and economic growth. Foreign investment was welcomed and investors were given government protection. Major electrification and irrigation projects were undertaken with American foreign aid and General Sarit personally initiated a clean-up campaign in the cities.

Sarit restored the motto "Nation-Religion-King" and tried to urge the king and his consort to participate in the national life and establish more contact with the people, who had an affection for the monarchy. General Sarit also centralized all monastic orders under a superior *patriarchate,* and monks – especially in the north and the northeast – were mobilized to support government programs. General Sarit continued Thailand's anti-Communist policies. He was also instrumental in establishing the ASEAN grouping in 1961, and when the Pathet Lao moved into northwestern Laos, his Foreign Secretary Thanat Khoman signed a protocol with the United States Secretary of State Dean Rusk in March 1962 which provided that both parties would interpret the SEATO Treaty of 1954 as a bilateral as well as a multilateral pact, binding the United States to come to the aid of Thailand in time of need, with or without the agreement of the other signatories of the pact. By May 1962 the first American troops arrived in Bangkok in response to the deteriorating situation in Laos: a visual proof of American commitment to Thailand.

In December 1963, however, Sarit died in office. His deputy, Thanom, continued his goals of political stability, economic development and the safeguarding of Thailand from Communist aggression at home and from abroad.

The Constitution, debated since 1960, was finally proclaimed in 1968, but martial law remained in force. Elections were held in January 1969 and Thanom's United Thai People's Party won 75 members in the 219-member House, being the largest delegation among the thirteen parties represented. Economic growth in the 1960s and early 1970s averaged about eight percent, and foreign aid and foreign investment continued to pour in, mostly from Japan (one-third of all investments) but also from the United States and the Republic of China on Taiwan, which became the third highest investor in Thailand.

The government permitted American bases in Thailand to be used for raids against North Viet Nam and later Cambodia. By

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1968 45,000 American troops and 500 combat aircraft were stationed in Thailand.

President Johnson's March 1968 announcement, that the United States would halt the bombardment of North Viet Nam and seek a negotiated settlement shocked the Thai government, as it failed to include any provision for Thailand's neighbor, Laos. As a result, Thanom in 1970 proposed a formal alliance linking Thailand with the non-Communist governments of Laos, Cambodia and the Republic of South Viet Nam in order to unite Asian anti-Communists for Asian security. Unfortunately, Thanom failed to get the support of either President Nixon or Secretary Kissinger.

One of the major reasons for this new view of Communist aggression was, of course, subversion by Communist guerillas in northeastern and southern Thailand. In the south, Chinese Communist guerillas operated in the jungle areas just north of the Malaysian border, making common cause with Malay separatists. To this day, small pockets of guerillas continue to control some border areas in the south.

More serious has been the insurgency in the northeast, arising from several causes. These included grievances due to relatively poor economic and social conditions, disproportionately low government expenditures for regional development and the presence of thousands of pro-Communist Vietnamese refugees who had settled in the northeast during the year 1950-54, having been chased out of Viet Nam by the French. The insurgency festered until the end of 1982, when most of the Communist cadres surrendered to the Thai military in view of declining Communist Chinese support. However, there are reports that the Vietnamese are now training new Communist cadres in order to revive the insurgency in this region, and that they are equipping them with modern weapons.

The limited experiment with a parliamentary government lasted only three years. In November 1971 Thanom executed a coup against his own government. The Constitution was suspended and a military junta was established under the name of the National Executive Council, consisting of Thanom, his son (also the son-in-law of Praphat) Narong Kittkchachon, and Field Marshal Praphat Charusathian.

The military coup led, however, to serious disturbances and lack of support by the general public despite strong security

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measures. Not only the army, but the universities and the labor movement were divided. Thanom's close association with the United States, the ubiquitous Japanese penetration of the economy, and official corruption were decried. Also charges of nepotism were made following the appointment of Narong, the son of Thanom, to the military junta.

The triumvirate of Thanom, Praphat and Narong ignored the king, and the concentration of power in the Thanom family contravened the "civic religion" and its adherence to the motto: "Nation-Religion-King."

Thanom definitely overplayed his hand by announcing a new interim constitution in December 1972. The latter provided for a totally appointed assembly, two-thirds of the members of which were to be selected from the ranks of the military and the police.

The Student Revolt and the Struggle between Democratic and Authoritarian Forces.

In May and June 1973 students and workers took to the streets, and in early October 1973 demonstrators were demanding the release of eleven students detained for distributing anti-government leaflets. On October 13, 1973, 250,000 people assembled at the Democracy Monument in the largest demonstration in the history of Thailand. A day later the troops opened fire on demonstrators, killing 75 and wounding hundreds. The troops also occupied Thammasset University.

The violence was too much for the king to countenance. Bhumboj Adulyadaj went on television in the evening to announce a compromise solution. Thanom had to resign as prime minister but was to retain his position as Commander-in-Chief of the armed forces. Sanya Thammasak, the rector to Thammasset University, known to be sympathetic to the demands of the students, was appointed interim premier. All three members of the triumvirate were allowed to leave the country secretly.

The student movement did not purport to be revolutionary. Tension resulted at least partially because of the failure of the university graduates to obtain suitable employment upon graduation. The picture of the king, figures of Buddha and the national flag were displayed by the student demonstrators in order to legitimize their opposition to Thanom.

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The political turbulence of October 1973 failed to bring the Left to power. While giving full credit to the students for the change, Sanya did not get their support as they were dissatisfied with the king's decision to let the triumvirate escape in secret and also by the emergence of professional politicians as the leaders of the "democratic movement."

The new October 1974 Constitution called for a bicameral legislature, including a popularly elected House and a Senate nominated by the king from a list provided him by the parliamentary leaders. The king could dissolve the Parliament, order new elections and appoint a caretaker government. Military officers and civil servants were barred from the Assembly, unless they resigned their commissions first. In the January 1975 elections, the weakness of Thai democracy – the proliferation of innumerable parties – prevailed. Forty-two parties received seats in the House, most of them organized around familiar political personalities without an ideological platform or a specific program. Ninety percent of the seats went to the *status quo* parties of the right and the center. The left was weak, mainly demanding land reform and neutrality. The first government under Seni fell within a month of its inception. Seni's brother Kukrit Premoj, leader of the small Social Action Party (*Kit Sangkom*), put a centralist coalition together and tried to decentralize economic planning and to put development plans into the hands of locally elected committees, only to experience sabotage from politicians anxious to defend their turf.

The military collapse of Phnom Penh and Saigon in 1975 had a severe impact upon Thai politics. United States-Thai relations were also affected more than any other relations between any other Southeast Asian nation and America. On the Thai side several factors surfaced. First, the students questioned the American tie and called for a speedy withdrawal of American units. It was also realized that no rapprochement with Communist Viet Nam would be possible without a withdrawal of the American troops. United States forces did finally leave by March 1976, leaving behind nagging doubts in the minds of the Thai military about the ultimate reliability of the American commitment. The nadir of Thai-United States relations occurred in the wake of the Mayaguez incident when the United States used the U Taphao airfield as a staging base for the rescue of the American freighter detained by the Khmer

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Rouge. Anti-American demonstrations, a rarity in Bangkok, occurred in the streets.

The most significant turn in Thai foreign policy took place in July 1975, when, after two years of negotiations, Thailand established diplomatic relations with the People's Republic of China, abandoning its former cordial relations with the Republic of China on Taiwan. However, Thailand was now seeking assistance from the PRC against potentially aggressive Communist neighbors, especially Viet Nam.

Kukrit's government was in trouble domestically from the start. Labor unrest and inflation were the main causes. The recession caused by the quadrupling of oil prices aggravated the situation. Thailand faced a serious overpopulation problem. Its 1960 population of 25 million had grown to 35 million in 1970, and 47 million by 1980. Despite impressive economic growth and decreasing imports of consumer goods, the per acre agricultural yield remained stagnant, and only the cultivation of new, poor-quality hill lands permitted the expansion of food production. All arable land reserves had been utilized by 1973.(3) The old rice premium remained in effect, although increasing rice production already brought the world and domestic prices in balance. $40 million was derived from the rice premium and it was spent by the government on agricultural development, a form of income redistribution. In the meantime, the flight of the small farmers to the cities continued, and by 1980 the Bangkok-Thon Buri megapolis reached a population of 4.5 million, or nine percent of the entire population.

At this point, the various insurgencies must be analyzed. During 1975-1979 these greatly worried the Thais, especially the rebellion in the northeast which seemed to be a linear continuation of Vietnamese aggression in Indochina and was expected to increase in intensity in anticipation of Vietnamese assistance to the rebels.

The Communist Party of Thailand (CPT), the main sponsor of all the insurgencies, was established in the late 1920s, but from the beginning it was mostly restricted to the Chinese and other ethnic minorities. The party was only legal in Thailand for four years, between 1948 and 1952, after which General Sarit drove it completely underground. The CPT used its agitators in the late 1950s to incite the inhabitants of the northeastern provinces, who had been neglected for decades by the central

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government. The government even failed to provide the residents of this area with adequate police protection against groups of bandits roaming the countryside, and separatist feelings were being promoted by the Communist Pathet Lao who wanted to break off the fifteen northeastern and northern provinces of Thailand and attach them to Laos.

Countrywide the CPT was never popular because of its Chinese leadership and its enthusiasm for the Pathet Lao and North Viet Nam. Mainland China provided the CPT members with training, advisors, equipment and, from 1962 on, with the clandestine radio — The Voice of the People of Thailand.

Overt armed insurgency in the northeast broke out in 1965; and in reaction to the local successes of the guerillas, the Thai government initiated a rural development plan in the northeast, fostered self-help associations, and placed locally elected councils in charge of development projects. Peking soon assumed an active role in the insurgency, providing bases for the headquarters of the Thailand Independence Movement and the Thailand Patriotic Front (both organized by the CPT), using the arrival of American troops as a pretext for supporting the guerillas.

The insurgency gained in strength between 1965-67, but was stalemated in 1968 by government offensives. It then focussed on the northern provinces where the CPT and its allies started another insurgency in the inhospitable mountains bordering on China and Laos. Again, the guerrillas were not ethnic Thais, but Hmuong hill people led by Chinese Thai Communists. The reason for Hmuong enmity agianst the Bangkok government was that since the 1960s the government had interfered with their lucrative opium trade, and primitive slash and burn farming techniques had denuded much of the forests. In the following years the government undertook major offensives, including the use of napalm, which only excerbated the conflict with the Hmuong who had been promised their own kingdom by the Communists.

In the south, the separatist Malay United Patanni Freedom Movement demanded a separate Moslem state, or union with Malaysia. Some of their leaders had originally been trained in the Royal Thai Army and were quite clever in their tactics. Besides receiving help from the People's Republic of China, the Malay insurgents also received assistance from Lybia and Syria.

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Despite heavy expenditures by the Thai and United States governments (the American share since the late 1950s is estimated to exceed $100 million), it was not until 1981 that the government began to liquidate the northeastern insurgency, and the southern rebellion still flourishes near the Malaysian border. In general the success in the northeast was due to the declining support of the movement by the PRC, and to new policies adopted by the Thai army in the late 1970s and early 1980s.(4)

> ....the operational policy of the Thai counterinsurgency was changing. Rather than concentrating largely on military action, designed to kill insurgents, the focus has shifted to actions that neutralized CPT tactics by reclaiming remote areas and their people from control by the terrorists. The approach included better coordinated civic action.

These new tactics led to the surrender of more than 2,000 insurgents by 1980. The process of pacification has proceeded, and in the fall of 1982 alone 1,000 members of the guerilla front took advantage of the government's amnesty program and laid down their arms. Remnants of the old CPT army still remain, and there is a danger that the remaining cadres will be reequipped by the Vietnamese in order to revive their guerilla war so as to exert pressure to the back of the Thai troops on the Cambodian border.

Present estimates of Communist guerilla strength is about 2,000 in the north, 1,000 in the northeast and about 3,000 in the south. There are still about 500 guerillas in the central provinces. Guerilla strength increased steadily until about 1975, but has been declining ever since. Part of the decline is also attributed to political uncertainty in the CPT in view of the new PRC policies.

Further changes occurred as a result of the Vietnamese invasion of the Democratic Kampuchea, as Cambodia was officially named under Khmer Rouge rule. The Khmer Rouge killed and tortured to death between one to two million of the population, but it still received PRC assistance in fighting the Vietnamese invasion of January 1979. Communist China even undertook a major frontier offensive against Viet Nam, but with little avail.

However, by 1979 Thai politics has shifted back to a more military dictatorship. One year after the fall of Saigon, law and

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order was coming apart at the seams. Students continued to demonstrate, political murders and bombings became commonplace occurrences, and the right organized the *Nawa Phon* (New Force) and the Red Guards in order to defend itself. Kukrit was obliged to resign in early 1976 and political violence during the ensuing election campaign left more than 30 dead. The new alignment of parties brought Seni back as prime minister of a four-party coalition. In August and September 1976, students at Thammasset University staged a play which was offensive to the royal family. Violent demonstrations against the students followed, and the student leaders who had appealed to the king for protection were arrested. A leftist rally protesting their detention resulted in a four day siege of the campus with serious loss of life and property. In the midst of the turmoil, Admiral Sangat Chaloyu executed a coup.

Executive authority was invested in a 24-member military junta, the National Administration Reform Council (NARC) under the chairmanship of Admiral Sangat. A conservative jurist, Thanin Kraivichian, was named prime minister and appointed a cabinet of technicians.

Curfew was again imposed, political parties and gatherings were banned, and censorship reintroduced. Many leftists were either arrested or fled underground to swell the ranks of the guerillas. Thanin also purged the military, but his anti-corruption drive and his suppression of the narcotics trade made many enemies for him. In October 1977 a coup led by Army Chief General Kriangsak Chamananek ousted the Thanin government. Kriangsak was named National Director of Peacekeeping (Prime Minister), sharing power with Admiral Sangat who headed the revolutionary council.

1979-80 saw the first confrontation between Thailand and Viet Nam as the Vietnamese armies sliced through Cambodia. By mid-1979 elements of eight Vietnamese divisions were deployed along the eastern border of Thailand. Simultaneously, a large number of Khmer Rouge troop units and some Khmer Serai (Free Khmer) troops arrived at the border, as did hundreds of thousands of Cambodian refugees asking for admittance.

The Thai government admitted numbers of refugees and deployed additional units of the Thai army along the border. Those refugees who were admitted were disarmed, while the majority of the refugees were left on the Cambodian side of the

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border in an international no man's land where international relief agencies tried to keep them from starving and assisted them with medical aid and supplies.

Thailand now appealed to the United States and the People's Republic of China for assistance in the event of Vietnamese aggression. President Carter repeated American assurances and PRC Premier Deng also promised active help.

Relations with the Soviet Union, never close, deteriorated. At first, Thailand allowed Soviet aircraft to overfly Thailand with cargo planes destined to bring food to Cambodia. The large number of planes and the number of flights proved, however, that they were mostly carrying military equipment to the Vietnamese in Cambodia. Flight clearances were, therefore withdrawn, but the Russians continued the flights without permission. It took a threat by Thailand to launch fighter interceptors to make Moscow discontinue them. All Thai forces were put on alert in 1979 when three Vietnamese divisions moved nearer to the border.(7)

Before the eruption of the crisis, however, the Kriangsak government collapsed following the unexpected resignation of its leader on February 29, 1980.(8) Economic difficulties were the main reason for Kriangsak's resignation. The announcement of a rise in oil prices – ranging from 24 to 60 percent – led to labor unrest, and the opposition of the right gained strength. Businessmen and politicians joined the chorus of critics, and when the four opposition parties threatened a vote of no-confidence in the lower house, Kiangsak resigned.

The Commander-in-Chief of the army, Prem Tinsulanond, a very able military politican, became the new premier. He led a bloc of 180 of the 300-member lower house and formed his cabinet largely of civilians, including the talented president of the Bangkok Bank, Boonchu Rajattien, a leader of the Social Action Party. Prem's reputation as an effective field commander and a man free of corruption assured him the backing of the army.

Faced with more than 20% inflation in 1980, Boonchu, now Deputy Prime Minister in charge of economic affairs, sought a loosening of bureaucratic controls on the economy, the granting of export incentives, and the development of export-oriented industries. He also favored increased foreign investment and sought to stimulate agricultural productivity.

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Before he could deal with the economy, however, the first Vietnamese incursion occurred on June 23, 1980. 300 Vietnamese soldiers crossed the Thai border north of Aranyaprathat, and occupied villages and two refugee camps in Thailand. It took more than a day of bloody fighting before the Thai army could evict them, with casualties high on both sides. The incursion was not an accidental one. Captured Vietnamese soldiers reported that they had orders to advance two kilometers into Thailand and hold their position for five days. This was a definite probing operation and represented the use of military pressure in an attempt to force a change of Thai policy in relation to Cambodia.

While the Prem government sought the maintenance of ASEAN and Western unity on Cambodia's status, and the withdrawal of Vietnamese forces, Viet Nam played on the sensitivity of Malaysia and Indonesia who were concerned about the establishment of close ties between Bangkok and Peking. Prior to the invasion, Hanoi propaganda purported to support the Kuantange principle by President Suharto and Prime Minister Husein Onn in April 1980. The agreement called for the acceptance of a more "broad based" Heng Samarin government and termination of ASEAN support of the Khmer Rouge government in return for a Viet Nam free of the Soviet Union and a partial withdrawal of Vietnamese troops from Cambodia. Prem had to travel to Kuala Lumpur and Djakarta and offer concessions to reweave ASEAN unity. He agreed to limit Red Chinese aid to the Khmer Rouge, to accept the non-Communist elements of the resistance and to try to bring all the resistance parties into a broad-based coalition. The invasion recreated ASEAN unity, and at the ensuing Foreign Ministers Conference all member states denounced Viet Nam as a naked aggressor, stating that the attack on Thailand was "directly affecting the security of ASEAN member nations."(8)

The ASEAN meeting was also attended by American Secretary of State Edmund Muskie, who echoed the same feelings and arranged for the airlifting of artillery and infantry weapons to Bangkok, and accelerated the delivery of medium tanks for the Thai armed forces. $70 million FMS credits were also voted for Thailand by the United States Congess in its supplemental budget.

The Vietnamese incursion was repeated in 1981 without

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much success, and the international relief program to the several hundred thousands of Cambodian refugees left on the Cambodian side of the Thai frontier went into high gear, overcoming starvation and suppressing epidemic diseases among the refugees. But Thailand was faced with the arrival of large numbers of Vietnamese boat people and Thailand was forced to institute a "humane deterrence" policy by placing new arrivals in detention camps of great rigor and not allowing the new arrivals to settle in Thailand. In consequence, the arrival rate of Vietnamese has since diminished considerably.

Thailand was strongly denounced for the inability of the Thai police (some say unwillingness) to prevent the recurring cruelty by a small segment of the Thai fishing fleet in the Gulf of Thailand against the Vietnamese boat people. The horror stories reaching the West created revulsion in the United States Congress, which voted limited funds to help Thailand to fight piracy. These funds were increased in 1983, but until now no real success has been attained. If there are less incidents it is because the number of fleeing boat people has decreased.

Prem is the longest serving Thai premier to hold office since the October riots of 1973. He retained office despite his planned retirement after the April 1983 elections. His close relations with the armed forces and the monarchy, his backing by civilian politicians in the lower house – who have asked him not to retire but to lead the new government – provide him with sufficient power to lead the cabinet despite the meteoric rise of General Arthit Kamlangek, the new Commander-in-Chief of the Armed Forces, who, in 1982, often acted as mediator on such diverse issues as strike settlements and the lowering of Bangkok bus fares.

The partial return to democracy through the general election in April 1983 was preceded not only by a lively political debate but also by increasing labor and student unrest in the fall of 1982.(9) The general elections of 1983 were also important, since, for the first time, the provinces have become single constituencies, reducing the number of parties represented in the parliament. Even in this election no party received an absolute majority, but Prem had no difficulty in forming a broad-based coalition and his nearest rival refused to form a government and called upon him to return from retirement and lead the nation.

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When Prem faced another Vietnamese incursion in May 1983 the ASEAN nations succeeded in putting the three factions of the Cambodian resistance into a loose coalition government under Prince Norodom Sihanouk, and in arranging for the Cambodian U.N. seat to go to a representative of the new Democratic Kampuchea government (instead of to a representative of Heng Samarin). Viet Nam again tried to eliminate the pockets of Cambodian resistance. In April and May 1983 several Vietnamese divisions attacked resistance forces in western Cambodia, including armed followers of the Khmer Rouge and the Sihanouk faction in the camps near the Thai border, entering Thailand only to be evicted after two days. The usual scenario reappeared. The United States airlifted weapons to the Thai military, the United States Congress voted emergency military aid to Bangkok and ASEAN denounced the Vietnamese attack.

In the meantime, even before the attack, the Vietnamese government had announced a partial withdrawal from Cambodia which turned out to be only a rotation of troops. Thailand, therefore remains both a front line state and the advanced bulwark for the anti-Communist resistance forces in Indochina. An interesting aspect of the Vietnamese incursion was that the latter never attacked the well-armed, but only 10,000 strong forces of the Khmer Serai under Son Sann. The troops of the Khmer Rouge, on the other hand, who were in the past fierce fighters, were simply fleeing the battlefields before the Vietnamese units.

Thai relations with the United States remain very close and the United States is providing Bangkok with the long range, surface to surface missile, Harpoon. The Cobra Gold 1982 joint military exercise also shows the extent of cooperation between the two states. Thai relations with the PRC remain close, trade is expanding, and Prem visited Peking last November. Relations with the U.S.S.R. are cool, at best.

Thailand's fifth Five Year National Economic Plan went into effect in 1982. The government is developing basic industries on the eastern seaboard, and is building deep-sea ports in order to lure industry away from Bangkok. The cost will be about five billion dollars in five years, of which Thailand is counting on $1.5 billion help for infrastructural projects.

The economy is still growing at the rate of 4.5% (1982), per

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annum and the trade deficit was halved in 1982. Signs of U.S. economic recovery forecast a more robust economic growth, at least for 1984.

Politically, the peaceful elections and the prevalence of the center-right government coalition allow hope for continued political stability not seen since the days of General Sarit, and in a more democratic framework. Persistent economic problems, overpopulation and continued student and labor unrest, however, inject imponderabilia into Thai politics, which must be reckoned with.

FOOTNOTES

(1) *Area Handbook on Thailand* (Washington, D.C.: American University Press, 1981), pp. XIV-XV.
(2) *Area Handbook on Thailand,* op. cit., p. 35.
(3) *Area Handbook on Thailand,* op. cit., p. 44.
(4) Ibid., p. 68.
(5) Ibid., p. 72.
(6) *Area Handbook on Thailand,* op. cit., p. 222.
(7) Larry A. Niksch, "Thailand in 1980: Confrontation with Vietnam and the Fall of Kriangsak," *Asian Survey* (February 1981), pp. 223-27.
(8) Niksch, op. cit., pp. 227-28.
(9) Suchitra Puryaratabandhu-Bhakdi, "Thailand in 1982: General Srthrit Takes Central Stage," *Asian Survey* (February 1983), p. 173-74.

This article has been excerpted from the author's book published by the Council for Social and Economic Studies under the title *Southeast Asia,* (1984) 128 pages, paperback, price $12.

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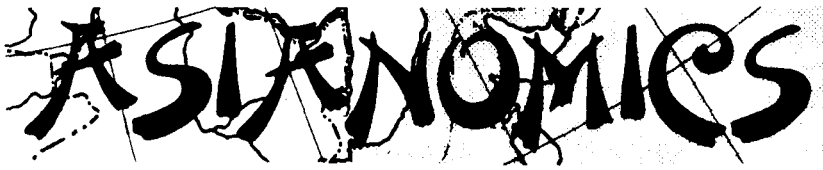

CHALLENGE AND CHANGE IN NORTHEAST ASIA

By Dr. Donald J. Senese

The author is a former Associate Professor of history who has taught the history of China, Japan and Korea. A traveller and writer on Asian events, he is a member of the Intercollegiate Studies Institute, University Professor for Academic Order, the American Council for Free Asia, the Japan-America Society and the Conservative Historians' Forum. His book MODERNIZING THE CHINESE DRAGON received a book recognition award from the Freedoms Foundation, Valley Forge, Pennsylvania.

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SHADOWS OF THE RISING SUN: A Critical Review of the "Japanese Miracle"
Jard Taylor
William Morrow, New York, 1983

The ascendancy of the Japanese as one of the world's pre-eminent industrial powers has an obvious interest to economic planners and policy-makers. Indeed, one popular theory about the success of Japan is that it is due to superior planning there, at both the governmental and corporate level, planning which presumably could be emulated here. Jared Taylor's main purpose in this book is to disabuse us of the popular notion that the Japanese have developed a new and superior design for the organization of a modern economy, one which we can copy and thereby "keep up" with the Japanese. Taylor's thesis is that Japan's success has its roots in a cultural inheritance which cannot be copied by any Western people, but in particular by the American variant. By the end of the book, however, he is suggesting that, after a generation of full exposure to the "solvent of modernization," this inheritance could be disintegrating and, with it, Japan's comparative advantages over the West.

The author devotes the first half of this book to describing how this cultural inheritance manifests itself in the Japan of today. Remarkably enough, there is very little else like it available to us, which makes Taylor's contribution valuable indeed (perhaps the absence of a literature on the special character of the Japanese people, despite their importance to the world economy, is not so remarkable after all, since, as Gibney tells us in his *The Fragile Superpower* (W.W. Norton, p. 36), less than a thousand native Americans are able to read Japanese competently, and it is out of this tiny group, most of whom are neither writers nor students of the Japanese character, that a book like Taylor's must come). It should be emphasized, however, that the book is not an ethnographic treatise and Taylor is not a professional ethnographer – he writes out of his experience as a missionary's son raised in Japan until the age of 16 and who later returned to Japan as an American businessman. But his effort, impressionistic and lacking in rigor as it is, will have to

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do until social and policy scientists, including economists, are trained to do the kind of systematic and detailed description of the "cultural capital" which figures so largely in the success or failure of a people to compete in the modern international economy. The ruling paradigm today in the social and planning sciences is that inter-populational variation is largely explained by policies rather than endowments. Hence, the hunt for the secret blueprint of the Japanese economy, corporations, schools, etc., the results of which hunt have been well published and publicized (see, in particular, Vogel's *Japan as Number One* and Ouchi's *Theory Z*; Cummings' *Education and Equality in Japan* is less well publicized but of the same genre).

Taylor submits the following interlocking complex of traits as underlying Japan's superior economic performance: (1) an intense sense of racial and cultural separateness, explaining, among other things, (i) the continued Japanese reluctance to grant residents of Korean descent, born and raised in Japan, Japanese citizenship, (ii) the national decision not to institute a guest worker program, despite labor shortages equal to those of Europe, and (iii) the refusal to accept more than a token number of Indochinese refugees ("So far," writes Sumitomo Bank president Kyonosuke Ibe in *Business Week*, Oct. 6, 1980, p. 18, "our strength has been in our homogeneity. As a people, we could predict the reactions of 100 million people of a single race"); (2) a rigorously bred sensitivity to hierarchy, both within and between groups, the latter including countries and races; (3) an equally strong indoctrination in group norms and in the duty to identify with and work for a purpose greater than oneself; and (4) a general preference for non-verbal over verbal communication, for intuition over strictly rational thinking, and for human relations that are "wet" (warm and emotional) rather than "dry" (formal, logical). Taylor goes on to explain how these "behavior patterns" have been exploited by the Japanese economy to produce the impressive system of production that we observe today. In concluding this section, Taylor writes:

> Japan's success is not due to management tricks that any ambitious executive can learn. It is built on the national characteristics described in previous chapters, on a powerful combination of diligence, loyalty, and devotion to the group that makes Japanese workers unique. It is the Japanese worker, not the executive, who has made Japan great. In my view, management's main achievement is to have

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channeled and directed the qualities that workers bring to the job in the first place.

As Waldo Emerson said, "Judge of the splendor of a nation by the insignificance of great individuals in it."

Unlike several authors, such as the psychologists Richard Lynn and Raymond Cattell and the late Cyril Darlington, Taylor fails to include the high intelligence of the Japanese on his list of "national characteristics." I would tend to agree with these authors but have not the space to argue here that it is the *combination* of high intelligence and the charactersitics described by Taylor which has catapulted the Japanese to the head of the industrial world and that diligence, loyalty, and devotion to the group are by themselves an insufficient lever.

The second part of the book consists of a series of essays on a number of important Japanese institutions as they exist and are evolving today, information about which is not readily accessible elsewhere in the English language: sex roles and sexual practices in Japan, the fate of the traditional Japanese arts in modern Japan, the Japanese language (the core of any culture) and the accelerating infiltration of English words into it, and, finally, the changing attitudes towards work in the post-war birth cohorts, cohorts who have inherited rather than created the Japanese "miracle." Taylor introduces these subjects to show where the major stress points in Japanese society are and, thereby, to explore how vulnerable the Japanese economic system is to the kind of decadence, in the strictly technical sense of that word, the Japanese see our own system succumbing to now. It is likely that when the great treatise is finally written about why the mass consumption economy is unsustainable, if indeed it is such, that one of the main points of stress and sources of collapse will be shown to be the first of those treated by Taylor, i.e., the family and sexual mores more generally. It is on this subject that Taylor is at his weakest (though this is not to say that he is not very informative and insightful on this subject, too).

There are, first of all, some minor but telling errors. Indeed, the only errors I was able to detect in the entire book occur on the subject of sex roles and the family, a remarkable record but a suspicious clustering that bears attention. On page 69, for example, Taylor describes Japanese babies as being "taken into the tub with their parents rather than put into bassinets and

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washed from outside," when, of course, bassinets cannot be used to wash anything, especially babies; and page 186 repeats the apparently impossible-to-kill myth that until recently (20 years ago, according to Taylor) public baths did not separate the sexes and that men and women bathed together with no sense of indecency. To my knowledge, mixed bathing was and is rare in Japan and if it occurred at all was largely confined to the elderly, who are considered sexual neuters by the Japanese anyway. It was and is unheard of for younger but particularly nubile women to bathe with men. As for men and women "relieving themselves on the side of the road with no effort at concealment," this was and still is true of men but, again to my knowledge, rarely if ever true of women. Finally, Taylor states that "unescorted women can walk freely at all hours of the night in practically every neighborhood" of Tokyo. Japanese women in fact are quite leery of many neighborhoods in Tokyo as well as elsewhere after dark. The low incidence of rape in Japan (if indeed it is such and not just a statistical artifact of a disinclination by women to report the crime) may be due as much to their and their families' vigilance as to the dearth of potential rapists and of the circumstances favoring them, though it must immediately be pointed out that the American association between violence and rape *is* rare in Japan and the rape of elderly women unheard of. Rape appears to be a simple act of sexual theft and like sex in general in Japan, is unaccompanied by the heavy psychological freight that it seems to carry in the West – thus, Roland Barthe's brilliant aphorism in his *The Empire of Signs* that "In Japan, sexuality is in sex, not elsewhere; in the United States, it is the contrary; sex is everywhere, except in sexuality."

Taylor's errors on this subject are not important ones, but they do suggest a certain unfamiliarity with sexual practices and mores in Japan that served to shake my confidence in the author's general thesis in his chapter on this subject that "after the Islamic countries" Japan "will remain for some time to come to the scene of perhaps more sexual distress than any other on earth." (I will ignore Taylor's implicit position here that there is more sexual distress in a sexually "repressive" than in a sexually "open" society – a position that has become a virtual totem among American intellectuals, social scientists and opinion-makers.) Still, the relation between the sexes may

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indeed be, as Taylor hints, Japan's (much sought after?) Achilles heel, with which to bring it down into the West's own sick bed, to repeat the metaphor of a Japanese businessman quoted by Taylor. Proceeding inductively to establish this point, Taylor makes the following observations. Japan is, like Western Europe and to a lesser extent the U.S., awash with sexual imagery – on television, in advertising, and on the movie screen. Sexual mores remain, however, in Taylor's words "Victorian," a rather derogatory term for a society in which the sex act, apart from prostitution, is confined to marriage. The pill remains unavailable, because, Taylor speculates, policy-makers fear its erosive effects on these "Victorian" mores. Finally, the role of women remains that of wife and mother, rearers of the next generation. Women's liberation has yet to arrive in Japan – but will inevitably, according to Taylor, because of Japan's inability to ignore any great public issue that takes hold in the West, to which it feels a residual inferiority and irresistible need to emulate (a sense of inferiority, incidentally, which, as Taylor describes in some detail, has its roots as much in the feelings of physical and racial inferiority as in the now rapidly disappearing feeling of cultural and economic inferiority – Caucasian facial features, body size and form, and coloring still daunt the Japanese to a degree few Westerners can even begin to comprehend, as can be seen, for example, in the overwhelming predominance of Caucasian models in Japanese women's magazines). The permeation of the Japanese media by sexual imagery only accelerates, according to Taylor, the inevitable arrival in Japan of the sexual revolution, in the *full* sense of that word to include the elimination of all sex-specific castes and occupations. In short, contemporary Japanese society is rife with sexual tensions, contradictions, and confusions, and the future promises to bring considerable upheaval, both in the relationship between the sexes and in the family.

What makes Taylor's argument particularly interesting to Americans is the possibility that the Japanese economic machine, at least as it is presently constructed, will not be able to withstand the shock of the arrival of the sexual revolution. For if, as Taylor claims, the roots of Japan's ascendancy are in its cultural capital, built up in the pre-modern era but requiring renewal every generation (in contrast to the West, whose economic strength is, arguably, to a greater extent grounded in

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formal institutions and no longer so dependent upon pre-modern patterns of behavior), and if the foundations for this cultural capital are laid each generation in the family, then the shortest and surest route to bring down the entire edifice is to undermine the family, and in particular the morale of its central figure, the Japanese wife and mother.

There are signs, though still very faint ones, of a shift in the role of Japanese women away from their traditional specialization in the up-bringing of the next generation towards a greater freedom of choice regarding occupations. Birth rates, for example, which until 1973 were around replacement, have fallen well below this level, and approximate those of Europe and white, non-Hispanic America. It has been argued by Spengler among others, that a good leading indicator of decadence in a society is the disinclination of its women to breed (and rear) the next generation, and if so this leading indicator has certainly shown itself in Japan, so much so that a not insignificant faction in the Diet is agitating for legislation to severely restrict abortions, which now outnumber births in Japan (*People*, 10(2): 29). Other statistical evidence of an increasing conformity to Western patterns of family breakdown is lacking, however. Divorce rates remain low, as do illegitimacy rates and ratios. And though Becker in his *A Treatise on the Family* was able, by eliminating unpaid family workers and the self-employed, to show an increase in the Japanese female labor force participation rate over the post-war period, in their unmanipulated form the time series on this rate show a downward trend, in contrast to every other country in the developed world. (Some slight upward trend has been observed in the last ten years, however, in concert with the drop in fertility.) So it is not clear that "sexual distress" in Japan will ever be such as to cause the complex of cultural traits which so crucially underlie the success of Japan to fly apart. In this respect, as in others (e.g., the Japanese work ethic, group loyalty, etc.), Japanese culture may just succeed in preventing the penetration of the "solvent of modernization" into its deepest structures.

Taylor himself seems doubtful that the Japanese culture will be able to withstand the erosive forces set in motion by the modern mass-consumption economy. He describes, in anecdotal fashion, many other signs of convergence, as the post-war birth cohorts gradually replace the generation born before and during

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the war, between Japanese and Western cultural patterns, in addition to the sexual mores discussed above. Though no hard evidence is available yet to substantiate or contradict Taylor's belief in such a convergence, he at least points the way to how and where such evidence might be most fruitfully collected. All in all, he has produced an extraordinarily insightful and illuminating book, about a people whose accomplishments challenge many of American planning's most cherished values and preconceptions and whose future evolution is equally challenging to the predictive power of the social sciences.

Daniel R. Vining
University of Pennsylvania

ASIANOMICS
Donald J. Senese
The Council for Social and Economic Studies, Washington, D.C.

> "During the centuries which followed, Europeans approached Asia with a variety of emotions ranging from trepidation to enthusiasm, and a variety of motives including a hope for wealth, ambitions for conquest, desire for increased trade, a zeal for religious conversion, and a thirst for power. The pictures drawn of Asia through written accounts and oral reports for the residents remaining in Europe spanned the horizon, from crowded and dingy countries where civilization (if it could be called that) was "backward" to the romantic illusions of the French philosophers of a land where an enlightened despotism held sway which could teach Europeans the art of advanced and progressive government. The interested observer could select his choice from amongst these Asia stories depending on what he wanted to read — and believe."

Thus author Senese portrays the roots of cultural, political and economic contact between the West and the East. After a brief survey of the history of the Far East, he then proceeds to guide his readers into a survey of the modern industrial (and demographic) explosion of Asia, as a result of which several of the major nations have progressed from the status of "developing nations" to that of "newly industrialized nations" — with a future growth potential far in excess of that of the currently declining industrial nations of Europe.

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Written with an emphasis on economic factors, this current survey of the Orient is nevertheless of importance to students of contemporary social and cultural conditions, since economic factors *do* intermesh intimately with social and cultural conditions. It is therefore virtually required reading for social scientists concerned with studying the rapidly changing mores and fast-evolving social transformation of the recently industrialized regions of the modern Orient.

BYRON L. JOHNSON & ROBERT EWEGEN
B.S. The Bureaucratic Syndrome
North River Press, Inc., Croton-on-Hudson, New York, 1982.

"This is a biased book. It is patently unfair. Like any satire, it is woven form gross generalization and oversimplification. *But it is true*" – so runs the preface to this amusing publication.

Alleging that: "Bureaucrats are more victims than villains. This book seeks to expose the Bureaucratic Syndrome, whose laws relentlessly strip society of the fruits of the bureaucrat's toil, not to castigate those caught in its grip." The authors proceed to lay down a number of principles of bureaucratic behavior. These include the following:

The Law of Shared Responsibility: "Wait – don't act – until others have given clearance."

The Law of Doubt: "When in doubt – don't."

The Law of No Precedent: "Never do anything for the first time."

The Law of Futility: "Any action is likely to be futile – so why try?"

The Law of Obfuscation: "Beware of plain English; its use can expose your inaction."

The Law of the Election Year: "Nothing of importance *should* be decided before an election; nothing...*can* be decided just after..."

The Law of Cancellation by Compounding: "Cancel the appearance of error by compounding it..."

The Law of the Well-Timed Departure: "Leave before... failure is evident; let your successor take the blame..."

Nothing more need be said to introduce readers to this book.

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